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ABSTRACT

The first article in this collection examines civil disobedience and the protections offered by the First Amendment. The second article discusses a study on antagonistic expressions in a free society. The third essay deals with attitudes toward free speech and treatment of the United States flag. There are two articles on media; the first examines political broadcasts on public radio and television stations, and the second discusses the increasing use of paid "editorial" or "advocacy" advertising. A list of suggested readings on the historical background of free speech and a review of Supreme Court decisions relating to the First Amendment during the 1972-1973 term are included. An extensive bibliography of articles, books, and court decisions relating to freedom of speech published between July 1972 and June 1973 is appended. (RN)

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FREE SPEECH YEARBOOK 1973

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Yearbook Volume Numbers

The Speech Communication Association began publication of the Free Speech Yearbook in 1970. Volumes are numbered from that date, with the 1970 Yearbook being Volume I, the 1971 Yearbook being Volume II, and the present publication being Volume IV. From 1962 through 1969 the Committee (now Commission) on Freedom of Speech printed a limited number of yearbooks in mimeograph form. Back issues of the mimeographed yearbooks are not readily available; however, libraries can make arrangements for photocopies with the Speech Communication Association's New York office.

CIVIL DISOBEDIENCE AND THE FIRST AMENDMENT TOWARD A BALANCE

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The use of civil disobedience as a social protest tactic has developed considerably over the last several years, and the effectiveness of some acts of civil disobedience cannot be denied. Many important American reform movements have been accompanied by expressions of civil disobedience.[1] The passage and enforcement of the Fugitive Slave Act of 1850 evoked much resistance as well as serious attempts to gain support for public defiance of the law. From the first meeting called to devote attention exclusively to women's rights in American society which was held in 1848, demands for extreme forms of resistance were heard. And the use of civil disobedience by civil rights leaders helped to uncover the injustices too long inflicted upon the black man. For persons of those times, a perception of evil resulted automatically in efforts to eliminate the evil. The reformers had to decide how to reach the apathetic masses, making them more sensitive to the need for a solution to the social problem confronting them. However, being heard proved to be difficult, and frequently reformers were moved to more drastic means of communication and persuasion.

How far does the right to protest extend? To what limits should the courts protect conduct whose aim is clearly that of protesting law or policy? Can civil disobedience by compatible with a system of free expression? Does it fall within the realm of protected speech, or must it be judged strictly as action? Thomas Emerson states that by definition civil disobedience constitutes action.[2] Civil disobedience is conduct which:

(1) is in violation of a valid (constitutional) law,
(2) is undertaken on the basis of a moral principle held sufficient to overcome the normal obligation to comply with the law,
(3) is nonviolent in nature, and
(4) causes no direct injury to other persons.

Emerson believes, however, that in the long run there is no incompatibility between freedom of speech and a measured amount of civil disobedience. In many ways, he states, it may be said to serve the same purpose as discourse. By dramatically focusing attention on a problem, by disclosing the intensity with which a position on this problem is held, and by warning of stress in the society, some forms of civil disobedience can make the democratic structure more responsive.

Emerson's definition opposes definitions set forth by other experts who believe that there need be no limitations imposed on the tactics of the civil disobedient. Howard Zinn, for example, defines civil disobedience more broadly as "the deliberate violation of law for a vital social purpose"[3] thus allowing for the violation of strictly immoral as opposed to strictly unconstitutional laws and imposing no restrictions upon means of disobedience.

The purpose of this paper will be to discuss some of the objections raised against the use of civil disobedience, and then to show a possible justification for a <u>limited</u> form of civil disobedience as a legitimate political protest protected by the First Amendment.

An absolutist approach to civil disobedience stands firm in the belief that under no circumstances may resistance to the law be justified. Every law is considered just, and a great wrong results when a law is broken.[4] But, since the law changes with time and adjusts to new social and economic situations, some indicator of the time for change is necessary. If it is accepted that the law is not static, that it is subject to change, to what extent does a law change without social pressure? Social values are on the verge of changing when a campaign for civil disobedience enlists enough supporters willing to accept the penalty for blatantly breaking a law.[5] As far as the nature of meaningful social pressure, one must question whether or not unlawful conduct is a necessary corollary of that social pressure. Can effective pressure instead be a reality through lawful means?[6]

Abe Fortas suggests that our democratic system allows the individual the freedom to criticize, to persuade, to protest, to dissent, to organize, and to assemble peaceably as long as "the form of its exercise does not involve action which violates laws prescribed to protect others . . . or which incites a clear and present danger of violence or injury to others."[7] Franklyn Haiman agrees that civil disobedience cannot be condoned in a society where legal channels are available such as the courts, the legislature, and the public forum.[8] Judge Frank Johnson points out that the majority of protests during the 1960's have been both legal and protected by the freedom of speech and the freedom of assembly. He maintains that in all but the rarest of circumstances there exists an alternative to disobedience of the law and that this course of action should be followed.[9]

Several arguments may be forwarded to show that present political channels may not be adequate to solve societal problems. First of all, how much effort must a citizen put forth in seeking legal remedies before resorting to civil disobedience? It can always be argued that the protester has not exhausted <u>all</u> available channels. Another inquiry may be set forth regarding the amount of time a protester must employ in searching for a legal means of protest--days, weeks, or years may be offered as the criterion for a sufficient search. Howard Zinn questions

the power of legal channels to call forth a remedy for the problem protested. He says that while the "present narrow avenues of protest" have called attention to the need for a change, they have not been sufficient to effect a change.[10] Thus, injury could go uncorrected for a long period of time, doing irreparable damage to those concerned.

> Where basic human rights are concerned, the major objective should be the change in the law rather than the sacredness of the principle. . . . It would appear baseless to assume that obedience to the law is always conducive to strengthening a democratic system, and that, indeed, here /sic/ may be times when civil disobedience will be able to jolt the democratic processes into greater awareness and immediate action. However, there are also limitations to temper the acceptance of civil disobedience as a social-change technique and to limit its application.[11]

Before discussing a possible justification for civil disobedience as a legitimate form of protest, I shall point out some of the arguments by those who maintain that civil disobedience is never justifiable. While some of these arguments may succeed in certain cases of civil disobedience, it is not impossible in other cases for all of them to fail.

One of the most frequently heard criticisms of civil disobedients is that they hold contempt for the law. Although the manner of the protesters may be defiant, their conduct is often out of respect for the law rather than contempt. It cannot be emphasized too often that "civil disobedience is a tactic aimed at effecting needed changes through deliberate and public self sacrifice."[12] The protester attempts to make clear that his intention is to reform, rather than to destroy the legal order. Because he offers evidence of his conscientious motives to himself and others, he is entitled to be regarded as other than a common criminal. Moreover, in willingly suffering the sanctions of the law, he demonstrates a fundamental allegiance to the legal and social order of which he is a part.[13]

Civil disobedience is also criticized for its selfish rather than social motives. The argument supposes that the civil disobedient acts with disregard for the rights of others. This may not always be the case. Mr. G.W. McLaurin, a Negro, was admitted, via a 1950 court order, into a doctoral program at the University of Oklahoma. If he had been civilly disobedient, i.e., if he had violated the restrictions imposed upon him instead of appealing to the court, his action would have been primarily personally motivated, yet having at the same time future consequences for others.[14] In most cases of civil disobedience both personal and social motives are present. Protests against the war, against poverty, or against racial inequality are performed not only for the benefits of those directly involved, but also for the sake of correcting a social injustice affecting many. Martin Luther King, Jr. believed that injustice anywhere was a threat to justice everywhere,

and that whatever affected one directly affected all indirectly.[15] The civilly disobedient act sometimes identifies grievances and areas of sensitivity unknown to legislative majorities, or if known, not taken seriously by them. It may induce the majority to consider whether there are ways to avoid conscientious objections, or if not, whether the legislative objective is worth overriding the scruples of the minority.[16]

The openness of the civil disobedient act coupled with the willingness to accept punishment moves the act away from the goal of personal gain and more toward social reform. Robert T. Hall suggests that if a person performs an act solely because it is required by personal conscience, it may be more likely for him to act in private, even taking precautions not to have the act made public. This may occur, for example, when an individual marries a person of another race in a state where interracial marriages are prohibited. But, if a person seeks social reform from his civil disobedience, he is no doubt very desirous of publicity.[17] Secret law violations are not ordinarily consistent with the objective of attaining widespread and conscientious consideration of the social conditions that precipitated the disobedience. Since civil disobedience constitutes an appeal to the conscience of the community, thus according to Gandhian tradition it must be open and public, the means must be nonviolent, and the protester must willingly accept prescribed penalties.[18]

Unfortunately, some protest groups have discovered that ordered, nonviolent acts do not seem to attract the media; if violent demonstrations receive more coverage than nonviolent ones, the frequency of the former is likely to increase.[19] This is another of the major criticisms of civil disobedience--that what starts out as a peaceful demonstration could all too easily erupt into violent confrontation. Yet, evidence available from the American experience does not support this allegation. A recent American study done by Solomon, Walker, O'Connor, and Fishman suggests that the number of violent crimes declines in black communities deeply involved in conducting direct action protests, at least so long as that activity continues. The authors speculated that when emotional expression occurred in a framework of community organization, it tended to reduce the need for aggressive outbursts of a violent sort, thus reducing incidence of crimes.[20]

Riots have erupted in the ghettos of our cities, and the rioters have voiced the same grievances protested against by civil disobedients. And it is true that these riots have sometimes occurred in the same cities in which civil disobedience was practiced. However, according to Carl Cohen, this does not prove that one is the cause of the other.[21] They are both reactions to serious social problems, being entirely different ways of attacking these problems. If there is a link between the protest and the violence, it may be deep social discontent that underlies them both.

Several critics indeed believe that violent actions may hurt the protester's goals. Noam Chomsky[22] says that civil disobedience should be entirely nonviolent, and Paul Goodman[23] insists that the protesters do not want to frighten and compel the populace, but instead get them to think, feel, and decide. Howard Zinn, in opposition to former Justice Abe Fortas, believes that because of the complexity and uniqueness of each act, it would be foolish to rule out all of the tactics beyond strict nonviolence.[24] I disagree. Resisting punishment and engaging in violent actions are characteristics of the revolutionary, not the civil disobedient.

> Civil disobedience . . . does not result in death or misery and rarely entails significant loss of property. It does not seek to unseat an existing government and does not destroy the order or stability of national or community life. It is a serious matter, in being a deliberate violation of a law, but it is a . . . mistake to confuse it with revolution or to view the civil disobedient as a revolutionary.[25]

The nonviolent nature of civil disobedience refers to the fact that it is intended to address the sense of justice of the majority, and as such is a form of speech, an expression of conviction. To pursue violence likely to injure is incompatible with civil disobedience as a mode of address. Perhaps, as Franklyn Haiman suggests, a distinction needs to be made between inconvenience and public danger.[26] Tying up traffic for a short period of time can hardly be compared to bombing, looting, and killing!

Legally civil disobedience is not considered a problem.[27] The conduct must be judged and dealt with apart from motivation. If a person wishes a law to be reviewed by the Court, for whatever reason, the law must first be violated and the offender arrested and prosecuted. While one may have empathy for the views which prompt an illegal act, the action by definition must be punished. Should the law be deemed inconsistent with the Constitution, the law broken will be invalidated and the protester will be vindicated. Even so, civil disobedience cannot legally be justified; no legal system can justify all conduct that seeks to challenge one of its elements, and certainly it cannot justify challenge in the form of disobedience.

If the goal sought by the civil disobedient is a change in the specific law he violates; if through the violation and subsequent prosecution and imprisonment he is able to call attention to the immorality (i.e., unconstitutionality) of that law; and, if in the end he succeeds in getting the law changed, in a sense civil disobedience (though not legally justified) has been successful. One needs only to examine the gains brought about by the civil rights movement to demonstrate this point. However, this argument of immorality of law justifies only direct civil disobedience--disobedience of the law that is in itself the

object of protest. Much civil disobedience is, on the other hand, indirect; the law violated is distinct from the actual object of the protest, and in itself is entirely acceptable to the protester.[28]

There may be situations in which disobedient protest is called for, while direct disobedience is out of the question. If the object of protest is the conduct of a war or another issue of national policy, it may be impossible to violate that policy directly. Through some symbolic action, the protester must attempt to dramatize and to effectively communicate his social concern.

> This symbolic tie may spring from the location of the disobedient act (e.g., in the Selective Service office, or on the site of segregated construction work), or from the time of the disobedience (e.g., deliberately blocking traffic on the anniversary of some fateful event), or from the nature of the disobedient act (e.g., pouring oil mixed with feathers on the floor of the main offices of an oil company responsible for much coastline pollution).[29]

It cannot be denied that symbolic conduct can sometimes be a very vivid means of communication.[30] But, whether or not certain forms of symbolic conduct can rightly be labeled pure "speech," thus qualifying for protection under the First Amendment, is questionable. William L. Taylor considers such acts as sit-ins, freedom rides, street demonstrations, picketing, and rent strikes as "appeals to law." The obstruction of traffic and damage of property, however, he finds to be blatant defiance.[31] Deliberate disobedience has been claimed in court appeals as essentially an act of speech. Speech may indeed take many forms, and the demonstrators did wish, above all, to communicate an important idea. Yet, deliberate violation of a trespass statute (or some such law), whatever the motivation, cannot reasonably be treated as one of the forms of speech deserving constitutional protection.[32] According to Justice Black, the First Amendment ". . . does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas."[33] This expansion of the notion of "speech" would be broader than originally intended by the First Amendment, and in fact such an interpretation could weaken free speech protection. When the First Amendment provision that the freedom of speech is not to be abridged may be resorted to as a defense for virtually any act, the need to qualify the protection it affords will be undeniable.[34]

If the Court recognizes that under some circumstances acts are expressive and should enjoy First Amendment protection, it will then need to determine the extent to which acts may be prohibited or restricted. Both the "clear-and-present-danger" test and "balancing" tests have been used in the past.[35] On October 15, 1965, thirty-nine protesters, mostly University of Michigan students, refused to leave the Selective Service Office in Ann Arbor as a protest against United States policy in Vietnam.[36]

After the sit-in, which extended an hour or two after normal closing time, they were removed from the premises. When brought to court for violation of a Michigan trespass statute, they claimed that because their protest was clearly a form of political speech, it was protected under the Constitution. The defendants did not argue that the trespass law was invalid, but they did maintain that such a law could not be used to suppress a sit-in protest under special circumstances. They asked that the interests safe-guarded by trespass laws be balanced against the interests of the entire community in maximally free speech. The balancing would thus result in the exculpation of a minor trespass, even if deliberate, providing it were carefully supervised and clearly intended as political protest.

Speech, they argued, is not restricted to verbal activity. The protection of such communication is so important that it should be provided even when it may appear to fall under special circumstances otherwise illegal.[37] This particular sit-in constitutes such "special circumstances." The demonstrators also claimed that they had a duty to protest against the Vietnam war on the basis of the Nuremberg Judgments. (The Nuremberg Tribunal, states the demonstrators, held that conduct in violation of state law should be protected when that conduct protests illegal governmental acts.)

Professor Harrop Freeman has suggested "that there is a strong case for the protection of protests and demonstrations--of civil disobedience--under the First Amendment."[38] While actions that are clearly symbolic and only incidentally illegal ought to be protected for what they are, obviously the First Amendment could not be extended to cover the whole range of civil disobedience. Only some acts of civil disobedience are intended as symbolic communication; many acts are aimed at testing the constitutionality of the law violated, and no communication is intended. Freeman states that First Amendment protection would not cover such acts as the refusal to serve in the armed forces or the performance of an illegal abortion considered morally justified by the physician,[39] but he does seem to allow for some balancing to take place, especially in the case of indirect civil disobedience.

The original purpose of the balancing test was to allow the Court to avoid the burdens placed upon it by the clear-and-present-danger formula. Those favoring balancing argue that speech cases involve more than the rights of the offending speaker. They present a conflict between individual and governmental rights.

> To arrive at realistic constitutional judgments in free speech cases the courts should, therefore, abandon the false emphasis of the clear-and-present-danger rule and impartially assess all the competing claims presented in a given case. Only when the damage to free speech outweighs the advantages to society and the protection to other individual rights afforded by the statute, should it be held unconstitutional.[40]

Shapiro, in discussing several of the weaknesses of the balancing test, refers to the Supreme Court's misleading application of the test. Derived from Roscoe Pound's theories of social engineering, balancing, when utilized properly, translates all claims to the same level. "Thus, a social interest may not be balanced against an individual interest, but only against another social interest."[41] What has resulted in numerous court decisions, however, has been the balancing of social concerns (e.g., national security, preservation of state, etc.) against individual minor or temporary invasions of those concerns.

As discussed earlier, in most acts of civil disobedience, social motives are inherent as well as personal motives. The indirect disobedient operates under the burden of making it clear to the public that he breaks the law to protest something else, an injustice affecting many members of society--an injustice he cannot attack more directly. Balancing, then, in such cases, is not concerned with the comparative weighing of individual interests, but focuses upon social interests. It is especially crucial that the indirect disobedient choose the form and circumstances of his disobedient act with intelligence and care. Even with the most careful attention to these factors, his deliberate law-breaking is not going to be greeted with public acclaim. But, if his aim is to accomplish a worthy social objective, he must attempt to reduce the anxieties his actions could evoke, and the relatively minute injury to the interests of the community ought to be balanced against the interest of the entire community in having an issue debated in an effective and dramatic manner.[42]

Perhaps the court could use a very specialized test of balancing in civil disobedience cases. Delbert Smith has suggested that the balancing process will take place in reference to each individual act of civil disobedience, and providing that certain criteria are met, many forms will probably be found acceptable. The criteria he suggests are:

(1) Persons may not be harmed, and property may not be destroyed.
(2) There must be unconditional submission to arrest and to the legal penalties.
(3) The protests must be directed at constitutional defects exposing either all of the people or some class . . . to legally avoidable forms of harm and exploitation.[43]

Smith's third criterion appears to include direct civil disobedience, but not indirect forms. Agreeing with Freeman that some acts of civil disobedience are intended as symbolic communication (i.e., indirect civil disobedience), I believe that those acts, subject to specific criteria, should also have the opportunity to seek First Amendment protection.

The criteria used for indirect civil disobedient acts could possibly include the following:

(1) The civilly disobedient act should be carefully supervised.
(2) It should be clearly designated as a political protest.
(3) It should be performed under the public eye in a manner appealing to conscience and to economic self-interest without playing upon society's fear of disorder.[44]
(4) It should be used as a last resort only after reasonable attempts to work through other legal channels have failed.
(5) The act should be appropriate to the purposes of the protest.
(6) Harm and inconvenience should be minimized.[45]
(7) Procedural details for the arrest should be worked out with officials in advance to assure an orderly demonstration.

In contrasting nonviolent civil disobedience and ordinary lawbreaking, Delbert Smith points out that the former is generally considered "formalized dissent." The lawbreaking itself is minimal and formal, highly publicized, and no attempt is made to escape arrest. The whole idea that the act is a symbol is of crucial importance, and because of this, care must be taken by the protesters to assure that their actions are not misconstrued as ordinary criminal actions. If the criteria mentioned above are adhered to, if care is taken to establish the formal, ritualized character of the disobedient act, the courts will examine the action (for evidence of formalization) and act accordingly.

While it is true that civil disobedience has been looked upon with a great deal of suspicion, it has, on rare occasions, served to sensitize the populace to grave human injustices. Great social reforms have come about through this evoked sensitivity. Like many other tools, civil disobedience may fall into the wrong hands and be used to hurt rather than help society. But, this has also been true of libel, of sedition, of obscenity, and of the many other forms of speech now regulated by First Amendment guarantees which serve to screen out the more harmful forms. Why then deny protesters, whose only available channel of effective communication may be nonviolent civil disobedience, the same protection? Why should some protesters be asked to suspend their moral rights because of the wrongs of others? The option should be there to allow civil disobedients--both direct and indirect--an opportunity to have their grievances heard, and to have their actions weighed against the freedom to voice those grievances.

FOOTNOTES

[1]Francis A. Allen, "Civil Disobedience and the Legal Order," in The Law of Dissents and Riots, ed. by M. Cherif Bassiouni (Springfield, Ill.: Charles C. Thomas, 1971), 154-161.

[2]Thomas I. Emerson, The System of Freedom of Expression (New York: Random House, 1970), p. 89.

[3]Howard Zinn, Disobedience and Democracy: Nine Fallacies on Law and Order (New York: Random House, Inc., 1968), p. 69.

[4]Delbert D. Smith, "The Legitimacy of Civil Disobedience as a Legal Concept," in The Law of Dissents and Riots, ed. by Bassiouni, pp. 170-171.

[5]Despite the harsh penalties for violating prohibition statues, many people chose to resist them. Alcohol was smuggled, manufactured, and consumed. Violators paid their fines or served their jail sentences and rejoined society with their community standing unimpaired; the law and its penalties revolted the people more than did the breaking of the law. M. Cherif Bassiouni and Eugene M. Fisher, "The Changing Times: A Basic Survey of Dissent in American Society," in The Law of Dissents and Riots, ed. by Bassiouni, p. 32.

[6]Richard C. Groll, "Clash of Forces," in The Law of Dissents and Riots, ed. by Bassiouni, pp. 112-113.

[7]Abe Fortas, Concerning Dissent and Civil Disobedience (New York: The New American Library, Inc., 1968), p. 25.

[8]Franklyn Haiman, "The Rhetoric of the Streets: Some Legal and Ethical Implications," The Quarterly Journal of Speech, LIII (April, 1967, 100.

[9]Frank M. Johnson, Jr., "Civil Disobedience and the Law," Vanderbilt Law Review, XXII (October, 1969), 1091.

[10]Zinn, Disobedience and Democracy, p. 60.

[11]Smith, "The Legitimacy of Civil Disobedience as a Legal Concept," p. 171.

[12]Carl Cohen, Civil Disobedience: Conscience, Tactics, and the Law (New York: Random House, Inc., 1968), p. 60.

[13]Sidney Hook, Paradoxes of Freedom (Berkeley, Calif.: University of California Press, 1967), p. 117 cited by Allen, "Civil Disobedience and the Legal Order," p. 129.

[14]Robert T. Hall, The Morality of Civil Disobedience (Evanston: Harper and Row, Publishers, Inc., 1971), pp. 39-40.

[15]Martin Luther King, Jr., "Letter From Birmingham City Jail," in Civil Disobedience: Theory and Practice, ed. by Hugo Adam Bedau (New York: Pegasus, 1969), p. 73.

[16]Allen, "Civil Disobedience and the Legal Order," p. 162.

[17]Hall, The Morality of Civil Disobedience, pp. 41-42.

[18]Allen, "Civil Disobedience and the Legal Order," p. 128.

[19]Smith, "The Legitimacy of Civil Disobedience as a Legal Concept," pp. 187-188.

[20]Solomon, Walker, O'Connor, and Fishman, "Civil Rights Activity and Reduction in Crime Rate Among Negroes," Archives of General Psychiatry, XII (1965), 227 cited by Allen, "Civil Disobedience and the Legal Order," p. 146.

[21]Cohen, Civil Disobedience: Conscience, Tactics, and the Law, pp. 151-152.

[22]Noam Chomsky, "Intolerable Evils Justify Civil Disobedience," in Civil Disobedience: Theory and Practice, ed. by Bedau, p. 202.

[23]Paul Goodman, "The Resisters Support U.S. Traditions and Interests," in Civil Disobedience: Theory and Practice, ed. by Bedau, p. 206.

[24]Zinn, Disobedience and Democracy, p. 52.

[25]Cohen, Civil Disobedience: Conscience, Tactics, and the Law, p. 44.

[26]Haiman, "The Rhetoric of the Streets," p. 104.

[27]Croll, "Clash of Forces," pp. 111, 117.

[28]Cohen, Civil Disobedience: Conscience, Tactics, and the Law, pp. 119-120.

[29]Ibid., p. 53.

[30]"Symbolic Conduct," Columbia Law Review, LXVIII (June, 1968), 1091.

[31]William L. Taylor, "Civil Disobedience: Observations on the Strategies of Protest," in Dissent: Symbolic Behavior and Rhetorical Strategies, ed. by Haig A. Bosmajian (Boston: Allyn and Bacon, Inc., 1972), pp. 87-89.

[32]Carl Cohen, "Law, Speech, and Disobedience," in Civil Disobedience, Theory and Practice, ed. by Bedau, pp. 171-172.

[33]James E. Leahy, "'Flamboyant Protest,' The First Amendment and the Boston Tea Party," in The Principles and Practice of Freedom of Speech, ed. by Haig A. Bosmajian (Boston: Houghton Mifflin Company, 1971), p. 425, citing Justice Black.

[34]Cohen, "Law, Speech, and Disobedience," p. 172.

[35]Leahy, "Flamboyant Protest," p. 431.

[36]For a further discussion of this case see Cohen, "Law, Speech, and Disobedience," pp. 165-177.

[37]The Supreme Court in 1964 (N.Y. Times vs. Sullivan) held that "debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Such acts as contempt, breach of peace, obscenity are allowable. Why then should not trespass also be permitted? Cohen, "Law, Speech, and Disobedience," pp. 167-168.

[38]Harrop Freeman, et al., Civil Disobedience (Santa Barbara: Center for the Study of Democratic Institutions, 1966), p. 9 cited by Hall, The Morality of Civil Disobedience, p. 135.

[39]Hall, The Morality of Civil Disobedience, pp. 135-137.

[40]Martin Shapiro, Freedom of Speech: The Supreme Court and Judicial Review (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1966), p. 76.

[41]Roscoe Pound, "A Survey of Social Interests," Harvard Law Review, LIX (1945), 2 cited by Shapiro, Freedom of Speech, pp. 83-84.

[42]Cohen, Civil Disobedience, pp. 159-161 and "Law, Speech, and Disobedience," p. 168.

[43]Smith, "The Legitimacy of Civil Disobedience as a Legal Concept," p. 182.

[44]William L. Taylor states that civil disobedient acts appeal to conscience, to economic self-interest, and to law. However, he believes that violations of valid laws are questionable and that such demonstrations tend to play upon society's fear of disorder. I believe that under certain circumstances such indirect disobedience may be allowed. William L. Taylor, "Civil Disobedience: Observations on the Strategies of Protest," in Civil Disobedience: Theory and Practice, ed. by Bedau, pp. 104-105.

[45]Nonviolent actions are more effective than violent ones because they promote an atmosphere in which an accommodation of conflicting interests is more likely to be achieved. If it can be shown that a protester attained his objective with considerably less obstruction to the interests and rights of the others, this would be an exceptionally strong consideration against the moral justifiability of a particular act. Allen, "Civil Disobedience and the Legal Order," pp. 92-93.

ANTAGONISM AND A FREE SOCIETY

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The idea certainly is not new that defensive behavior and some form of psychological "unfreedom" often go together.[1] For example, it has been found that one way of coping with an inimical and ambiguous world is to respond antagonistically toward the unacceptable.[2] Furthermore, the particular commitments and inclinations of an individual are known to bear importantly on how that person tends to express hostility.[3]

While much is known about connections between hostility and various other attitudes, little has been established empirically concerning its specific relationships to free speech.[4] What is apt to happen, then, when hostility is present together with either pro or con free speech attitudes? This report summarizes a study attempting to deal with that question.[5]

The volatile character of free speech in America today probably is undebatable,[6] though it has been suggested that a readiness to suppress such freedom is the primary reason for the volatility.[7] Arguments in support of this stance are quite compelling. And yet, a perhaps equally plausible view is that irrational thought can be found at both extremes of any free speech conflict, that clear thinking is more apt to occur when positions--whatever they be--are not held too passionately.[8] Studies concerned with dogmatism and rigidity suggest that antagonism is far from being the private property of any one attitudinal group.[9]

One theoretical analysis of freedom points out that those who cannot tolerate one another are neither apt to understand one another nor to "stay with" the frustrating task of seeking common understandings. As a result, their freedom to function usefully together becomes inhibited and eventually disintegrates. To the extent that conditions of belligerence become generalized, a society's freedom is jeopardized.[10] It seems quite safe to add that events of the past decade lend currency to this line of reasoning.

Three questions, then, served to direct the investigation in terms of these ideas. First, is it possible for those holding polarized free speech attitudes to "agree to disagree" and attempt to continue functioning together while at the same time seeking to understand their respective differences? Second, how does the presence of either a high or low hostility level relate to such possibilities? And third, what can be said concerning the presence of either a high or low hostility level when individuals hold moderate free speech attitudes?

Free speech was conceptualized in terms of Supreme Court decisions dealing with the First Amendment to the U.S. Constitution. An attitude scale developed by Barbour, tapping four specific free speech areas, served to distinguish pro and con free speech attitudes and to differentiate extreme attitudes from those moderately held.[11]

Hostility toward others, issues and events was viewed as related to polarized free speech attitudes. That is, the more extreme the view held (whether in support of, or in opposition to freedom of speech), the more apt such views would be expressed in a hostile manner. An instrument developed by Buss and Durkee served to distinguish high and low hostility levels.[12] This scale has been employed extensively in other studies of attitudes.[13]

An important aim here was to develop a clearer picture--beyond that obtainable in comparisons of scale scores--of the associations between free speech and hostility. How people who view the world differently talk about critical social problems is one useful way of going about such exploration.[14] Thus, an open-ended interview was used incorporating the two scales described above along with a number of pre-selected questions designed to provide individuals a chance to discuss certain social issues at some length.

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[11]This Likert-type inventory was constructed to measure free speech attitude consistency. The four areas tapped were: heresy and national survival, provocation and preserving the peace, artistic expression and public morality, and association, assembly, disclosure and disclaimer. Validation procedures employed together with extensive discussion of the instrument can be found in the reference cited.

[12]This instrument is composed of seven subscales tapping various aspects of hostility. According to the authors, these subscales may be employed individually or in various combinations. Given the nature of the population selected here, three subscales (suspicion, verbal aggression and guilt) were used to differentiate hostility levels.

[14]As pointed out by Hyman, information gathered on parallel phenomena can contribute to the development of norms when little is known empirically about an attitude (in this case, free speech).

Where might one reasonably expect to find extreme free speech differences? It has been demonstrated that those who differ in their belief and value structures (e.g., religious persuasions) tend to hold widely separated attitudes.[15] In other words, churchmen usually differ in the degree to which solutions to problems are attributable to God and beliefs or to man and his own capacities. In a similar vein, then, seventy-five college trained adults were selected from six Protestant denominations considered to be representative of a spectrum of religious beliefs.[16]

Scale scores did indicate that a relationship exists between hostility and free speech attitudes, though not entirely as had been anticipated. The relationship was far more evident among those ready to restrict freedom than among those desirous of encouraging it. That is, viewing free speech on a continuum, hostility was very high among opponents, moderate among proponents and relatively low among moderates. The more restrictive a person showed himself to be, the more apt he was to be hostile about it, whereas hostility was much more evenly distributed among those willing to support freedom.[17]

As a means of examining comments offered in response to open-ended questions, the interview materials were divided arbitrarily into four groups according to free speech scores (high and moderate opposition, and moderate and high support). How do people so grouped manifest hostility when discussing social issues of importance?

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[15]Selection of individuals from religious groups known to subscribe to divergent belief systems has been employed frequently in the study of attitudes. Rokeach used this "known groups" approach in his studies of dogmatism and attitude differences.

[16]Denominations were selected in a manner similar to that employed by Glock and Stark in their study of anti-Semitism in the church. Officials from each of these church groups provided names of individuals whom they deemed to be most representative of the values subscribed to by their respective denominations.

[17]The Mann-Whitney "U" test was employed to determine significance levels. Hostility was associated significantly with the restriction of free speech (probability .04), whereas the association between hostility and the support of free speech was not significant (probability .22). It should be noted that these results do not imply causal relationships between these variables. For a more extensive treatment of scale score comparisons, see the study by the author cited earlier.

Hostile statements were made by everyone interviewed regardless of subgrouping, though aggression appeared more often and with considerably more force from those at both ends of the continuum than from those in the middle. No such trends were in evidence among those scoring more moderately on free speech. In general, then, these discoveries provided some support for the idea that hostility somehow is associated with polarized free speech attitudes.

More specifically, those at the poles of freedom consistently emphasized the "blame" aspects of social problems, frequently indicating immediate and complete understanding of the issues involved. It was generally the "other side" that was responsible, wrong, or at fault. By dealing with them (the opposition) most tensions concerned with freedom of speech would be reduced, if not eliminated. This tendency to place responsibility elsewhere occurred across most topics discussed. Extremists, whether pro or con free speech, seemed to view extended discussion, particularly with opponents, with exasperation. Apparently, such would be appropriate only if conducted according to "predetermined" ends. Somewhat overstated, perhaps, the meaning of such discussion came across as little more than a monologue with the "enemy required to listen for a change."

How did the two extreme groups differ? As might be expected, those on the supportive side of freedom directed hostility toward "rightest" groups and the institutions they supported, whereas their counterparts reversed the direction of their hostility. The pro group frequently focused remarks at those in power and on problems presumably caused by them. Their comments were often quite lengthy--one hostile statement supported by another. The con group generally focused negative feelings on those considered to be the initiators of unrest and of the resulting problems. Themes ranged widely including such targets as moral decline and decay, outside or foreign agitation and agitators, people who "ought to know better," excessive public talk and action oriented minorities. In general, those strongly against free speech were quite abrupt and final when hostile. Many manifested evidence of guilt by concluding negative remarks with statements such as, "I know I shouldn't say that, but it's how I feel."

Moderate supporters of freedom usually directed antipathy toward unresolved issues and the collective apathy they perceived in society about such issues. Some commented about institutions resistant to change as being part of the problem. Most in this group seemed prone to qualify hostile statements, either before or after making them. For the most part, this group appeared to support continued, open, extensive discussion of social problems regardless of outcome.

Those moderately opposed to free speech also appeared to be less prone to express negative feelings toward groups or individuals. Exceptions did occur with respect to student protest and violence-centered activities where some blanket negativity without qualification did occur. This group

tended to express feelings of guilt differently than did those quite ready to restrict freedom. Self-criticism was directed at a lack of involvement in the issues rather than in terms of self-depracation for speaking out negatively about issues.

One interesting finding emerged with respect to those holding highly one-sided free speech views (pro or con), and with low scores on the hostility scale. These individuals appeared to fit more comfortably with the moderate group when discussing open-ended questions. This suggests that a certain kind of extremist has unique contributions to make. It would appear that such individuals could participate more dialogically with the opposition and be more prone to share responsibility for problems.

While exceptions occurred in open-ended comments related to hostility, the following trends were considered indicative of attitudes reflected in the four free speech groups created.

1. Extremists at both ends of the continuum tended to vent their antipathy toward issues, events and people; moderates tended to limit their hostile expressions to issues and events.

2. Extreme supporters of free speech often supported hostile remarks with further hostility; extreme opponents tended to be quite abrupt and final when hostile.

3. Both of the moderate groups usually qualified expressions of hostility, often acknowledging that they were part of the problem being discussed.

4. Hostile extremists tended to be in-group and blame oriented; nonhostile extremists came off as more akin to moderates in that they were more multi-group and resolution oriented when talking about social issues.

The democratic process implies the freedom to express views coupled with the opportunity to consider alternatives. That is, a "healthy" society is one which supports the freedom to express and the freedom to struggle with resolution as interrelated processes. It would seem, then, that those holding extreme free speech views in a hostile manner--insist either on the renovation or the maintenance of existing standards and codes--jeopardize the very process each seeks to perpetuate. In other words, those who seem unable to hear their opponents are not likely to "stay with" the frustrations and surprises that ordinarily accompany open dialogue. If both insistance on change and resistance to it can be considered outgrowths of preset beliefs, then extreme free speech attitudes presented with hostility could be viewed as static approaches to an open idea market.

By inference, the adaptive approaches of those in the middle range would appear more appropriate, if the democratic process is to be made at all workable. Research supporting this idea suggests that, first, the middle position represents some kind of compromise, and second, there are at least theoretically more moderates than extremists concerning either ideas or ways of implementing them.[18]

Attitudes tend to be group anchored--dependent in part on attitudes reflected by groups important to the individual. It is also known that norms differ from group to group as to how, over what, and to what extent hostility discharge is acceptable.[19] Thus, similarities would be expected between natural groups (churches, students, housewives, etc.) and artificially created groups. One implication here would be that evidence of hostility in artificial groups would perhaps be only an indicator of greater hostility in other groups.

In a somewhat speculative vein, it may be that a "permissive norm" for the expression of hostility operates among groups supporting free speech, whereas norms among those prone to restrict freedom differ in terms of the intensity with which the position is held. In the study reported here, extreme supporters did show less need to control hostility than did their restrictive counterparts.

Permit a bit of further speculation, even more removed from the study itself. As a recently removed observer, I've begun to acquire a rather different perspective on social issues in my homeland. Bay's analysis (discussed earlier) now makes more sense than ever.[20] Canadians do wear a somewhat different set of lenses than is true of Americans and tend to view events to the south with a certain kind of alarm. While the American scene obviously is quite complex, it appears from here that hostile confrontation is rather overused in the States, regardless of which side speaks. If this be at all true, the question remains as to just how much productive resolution of problems can take place.

An individual (or group) can get so involved in his own problems that some of the issues become blurred or misplaced. The principle of entropy suggests that it is possible and potentially destructive to "over believe" one's own solutions.[21] It might be useful for subsequent free speech research to include study of how outsiders--and not just Canadians--view the American struggle to be (or become) a free society.

FOOTNOTES

[1]Erich Fromm, Escape From Freedom (New York: Rinehart, 1941).

[2]J.W. Thibaut and H.H. Kelley, The Social Psychology of Groups (New York: Wiley, 1959).

[3]Leonard Berkowitz, Aggression: A Social Psychological Analysis (New York: McGraw-Hill, 1962).

[4]A.B. Barbour, "Free Speech Attitude Consistency" (unpublished doctoral dissertation, University of Denver, 1968).

[5]William E. Goding, "The Power and Hostility Dimension of Free Speech Attitudes" (unpublished doctoral dissertation, University of Denver, 1969).

[6]Franklyn Haiman, Freedom of Speech: Issues and Cases (New York: Random House, 1965).

[7]J.P. Roche, "The Curbing of the Militant Majority," Reporter, July 18, 1963.

[8]H.S. Commager, Freedom, Loyalty, Dissent (New York: Oxford University Press, 1954).

[9]Milton Rokeach, The Open and Closed Mind (New York: Basic Books, 1960).

[10]Christian Bay, The Structure of Freedom (Stanford: Stanford University Press, 1958).

[11]Barbour, "Free Speech Attitude Consistency."

[12]A.H. Buss and Ann Durkee, "An Inventory for Assessing Different Kinds of Hostility," J. Abnorm. Soc. Psych., (1953), 343-349.

[13]A.H. Buss, The Psychology of Aggression (New York: John Wiley and Sons, 1961).

[14]H.H. Hyman, Survey and Design Analysis (New York: The Free Press, 1955).

[15]Rokeach, Open and Closed Mind.

[16]C.Y. Glock and Rodney Stark, Christian Beliefs and Anti-Semitism (New York: Harper and Row, 1965).

[17]Goding, "Dimensions of Free Speech Attitudes."

[18]Bernard Berelson and Gary Steiner, Human Behavior: An Inventory of Scientific Findings (New York: Harcourt, Brace and World, 1964).

[19]A.L. Pepitone, Attraction and Hostility (New York: Atherton Press, 1964).

[20]Bay, Structure of Freedon.

[21]Paul Watzlawick, Janet Beavin and Don Jackson, Pragmatics of Human Communication (New York: W.W. Norton and Co., 1967).

A FIELD STUDY OF ATTITUDES TOWARD FREEDOM OF EXPRESSION AND THE FLAG[1]

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Barbour and Goldberg[2] have compiled the survey research studies on free speech attitudes. Those studies ranged from attempts to develop scales to measure free speech attitudes to studies which related those attitudes to religious affiliation and geographical location. A number of the research findings reported by the above writers suggested that Americans were poorly informed about their constitutional rights of free speech; and that a large number of Americans, young and old, are willing to restrict the free speech of others, particularly with regard to threatening issues.

Winter[3] attempted to determine public attitudes toward phrases in the First Amendment of the Constitution as well as rewritten versions of the same statements. She rewrote the statements from the First Amendment to put them into contemporary form. These statements were then administered as attitude items in a questionnaire to a limited sample of subjects from Illinois State University and from Bloomington, Illinois. She found that subjects tended to take a moderate stand on all of the statements (original and rewritten) except when the statements explicitly defined the nature of the freedom of expression. When stated explicitly, more subjects felt that the Federal Government could abridge the right of freedom of expression. Unfortunately, no attempt was made to compare the data for significance.

A second area of literature which lacked an empirical base concerned public attitudes toward the United States Flag. Lindmark[4] discussed the significance of the flag as a nonverbal symbol. While she attempted to explain the behavior of flag supporters, the justifications for their behavior were based on philosophical statements and not on empirical research of actual attitudes.

The amount of quantitative field research on attitudes toward freedom of speech and toward the flag have been limited. Since more such research was called for, an opportunity to study the attitudes of citizens of Peoria, Illinois, allowed for further testing of the Winter study and the Lindmark study. The purpose of this study was threefold: (1) to determine public attitudes toward free speech, (2) to replicate the Winter study on various versions of the First Amendment statements on a larger sample, and (3) to determine public attitudes toward the flag.

METHOD

The current investigation employed the following Likert scales in an attempt to measure attitudes toward freedom of expression and toward the U.S. Flag. (See Table Six for the items on freedom of expression and Table Seven for the flag items.) Subjects were asked to respond, strongly agree, agree, no opinion, disagree, or strongly disagree, to each of the items. These fourteen items were included in a larger questionnaire which was directed at attitudes toward higher education, the war in Viet Name, racial prejudice, and drugs (results are not reported here).

Subjects were a random sample of the population of Peoria, Illinois. The city was divided into nineteen areas based on the author's knowledge of the socio-economic makeup of the city. Fifty interviews were to be conducted in each of the areas. A total of 950 individuals were contacted personally by 18 research assistants during November, 1971. Each person was asked to cooperate in the study, and directions for the completion of the questionnaire were given to those who agreed. These directions were provided orally. Over 753 of the subjects agreed to cooperate. After removal of the questionnaires which were improperly completed, 722 questionnaires were usable.

While the study attempted to provide a random sample of Peoria, there is no guarantee that Peoria represents any larger population. Peoria was selected because of its proximity to Illinois State University and its size. It is a community of 115,000 people which combine urban and rural orientations. There is a representation of minorities including a depressed area in Peoria which was sampled in the study.

STATISTICAL ANALYSIS

The data for the original and rewritten phrases for freedom of speech were scored, totaled separately, and submitted to analysis of variance procedures. Analyses of variance were computed on the basis of age, political party, education, occupation. T-scores were computed for differences between males and females for each version of the scales.

Both original and rewritten versions of the freedom of expression scales were subjected to step wise multiple regression analysis in order to determine which of the demographic variables (age, sex, political affiliation, education and occupation) would have the greatest impact on the attitude items.

Likewise the data for attitudes on the flag were scored, totaled, and submitted to analysis of variance procedures on the basis of the same demographic variables listed above. Step wise multiple regression

was also used to determine the independent impact of the demographic variables on attitudes toward the flag.

The .05 level of significance was selected for the analyses.

RESULTS

Attitudes Toward Freedom of Speech

The analysis of variance for the original freedom of speech items revealed no statistical difference among the seven groups for age. No statistical differences were revealed for the nine groups of occupations. A t-test between males and females produced a significant difference for the original freedom of speech items ($t=2.09$, $p < .05$). The analysis of variance did reveal statistical differences among the eight education groups ($F=2.49$, $p < .05$). Table One presents the results of this analysis. Statistical differences among the three groups of political parties were also revealed by analysis of variance ($F=6.70$, $p < .05$). These results are reported in Table Two. The means for each of the groups are provided in the respective tables.

The analysis of variance for the rewritten freedom of speech items indicated no significant differences for the eight groups on the basis of education. No significant differences were obtained on t-scores for male and female differences. Again, the analysis of variance did indicate significant differences for the three political party groups ($F=10.25$, $p < .05$). These results are recorded in Table Three. Significant differences were obtained among the nine groups of occupations for the rewritten freedom of speech scales ($F=2.05$, $p < .05$). These are recorded in Table Four. Finally, significant differences were obtained for the analysis of variance on the seven groups of age ($F=3.14$, $p < .05$). These are recorded in Table Five.

In order to determine the differences in subject response to the original versus the rewritten versions of the freedom of speech concepts, a t-test was calculated between the mean of the original version and the mean of the rewritten version. A t-score of 6.53 ($p < .05$) was obtained. These means are reported in Table Six. Upon examination the subjects had a more favorable attitude toward the original version of the freedom of speech items than the rewritten version.

Attitude Toward the Flag

The t-test comparisons between males and females proved significant for items with regard to the flag ($t=2.28$, $p < .05$). The analysis of variance for the seven groups of age revealed a statistical difference among the groups ($F=6.70$, $p < .05$). The results are recorded in Table Seven. The analysis of variance for items related to the flag among

the eight groups of education revealed a statistically significant difference ($F=2.30$, $p < .05$). These results are recorded in Table Eight. Table Nine records the results of statistical difference for the three groups on the basis of party ($F=16.79$, $p < .05$). Finally, Table Ten records the statistically significant difference on the basis of analysis of variance for the nine groups of occupations ($F=4.57$, $p < .05$).

When the independent demographic variables were submitted to step wise multiple regression analysis, they failed to generate clear results. While some of the variables produced statistically significant f ratios, the accuracy of the regression equations in predicting dependent variable was quite low. In all cases less than 20 per cent of the variance in the dependent variable could be accounted for. Thus, no further analysis was made on the basis of the step wise progression procedure.

DISCUSSION AND CONCLUSIONS

From the overall comparison of the original and rewritten versions, one conclusion is clear. The subjects found themselves in closer agreement with items relating to the original freedom of speech and press statements. When the items were rewritten to include freedom of expression, defined as any symbolic act, or rewritten to allow organization's rights guaranteed under the Constitution, subjects found themselves more willing to restrict these freedoms. Although no data is provided from the questionnaire to accurately determine the basis for their lack of agreement with the rewritten version, it may be assumed that actions by students and other demonstrators with regard to symbolic protest have resulted in a willingness of people to restrict the first amendment freedoms. We are not as willing to restrict rights to the free exercise of religion or the establishment of religion as we are willing to restrict generalized unclear freedom of expression by citizens. The nature of these semantic differences for language usage issues have been explored in other literatures on meaning but not freedom of speech. Arnold and Libby[5] found that subjects attached different nuances of meaning to sexual terms that are supposedly referring to the same concept. They also found a lack of precision in the use of sex related language. These differences in language usage should be explored in the freedom of speech area.

As reported in Table One, the more educated subjects responded more favorably toward the original freedom of speech items. No such differences showed up on the basis of education for the rewritten versions. It should be noted that the original version contained more items related to religion and the press which were not contained in the rewritten version. Nevertheless, it can be concluded those subjects with more education were less willing to restrict all of the freedoms listed in the original items.

An examination of Table Two would indicate that independent party affiliates are less willing to restrict the first amendment freedoms of the citizens than the Democratic or Republican party affiliates. While this was borne out for both the original and the rewritten version of the freedom of speech items, the results should be regarded as only tentative. There was an even distribution among the three parties. This is certainly not what can be found from census data on Peoria as a whole. We would expect much less independent registration affiliation and much more from the Republican and Democratic party respectively. These results then must be considered with caution.

While significant differences were found on the basis of occupation, the distinction among these groups are not apparent. No clear conclusions can be drawn from this data with regard to occupation. The data must be reclassified for reanalysis at a later time.

It is surprising to note that no differences were found with regard to age for the original freedom of speech items. The results for the rewritten version appeared as expected. Generally, the older the subject was, the more willing he was to restrict the first amendment freedoms for all citizens. Keep in mind that this was found for only the rewritten version and not for the original version of the freedom of speech items.

It should be noted at this point that Barbour and Goldberg reported numerous studies for first amendment freedoms with regard to different groups. However, no cross comparisons were made for different age levels, different occupational groupings, or different educational background. The analysis thus far reported would be in general agreement with the studies reported by Barbour and Goldberg. This study allowed for the cross comparison among the various groups within the same study.

The analysis of data with regard to restrictive use of the flag presents no clear picture. Older subjects tended to be more restrictive in the use of the flag than the younger group. However, the analysis on the basis of occupation, party affiliation, and education are less revealing. No clear tendencies can be reported in these areas. Generally, all subjects tended not to be strong flag supporters. They tended, as Lindmark pointed out, to view the flag comfortably in man's subconscious as something to stand up for, to salute, to display on Independence Day, and to use on other ceremonial occasions. Perhaps more non-traditional uses in displaying of the flag have lessened our support for its restricted use. Displaying the flag in distorted form now appears on car tops, t-shirts, and even the seat of faded, worn blue jeans.

In summary, the results of this study would generally bear out the conclusions drawn by Barbour and Goldberg in their analysis of the literature on free speech. Peorians in this study did not stick tenaciously to the constitutional rights of freedom of speech. While

they were not generally willing to restrict the freedom of speech of others, they did not hold extreme views in support of the Constitution and of the citizen's right to express his freedoms. The results would indicate that Peorians support the constitutional rights of free expression but that this support is very weak.

FOOTNOTES

[1]An early version of this paper was presented at the Western Speech Communication Convention in Honolulu, Hawaii, on November 18, 1972.

[2]Alton Barbour and Alvin Goldberg, "Survey Research in Free Speech Attitudes," Free Speech Yearbook: 1971, p. 28-35.

[3]Gayle Winter, "A Survey of Free Speech Attitudes," (unpublished manuscript, Illinois State University, 1970), p. 20.

[4]Joyce Lindmark, "The Flag as a Non-verbal Symbol," Free Speech Yearbook: 1971, p. 64-69.

[5]William E. Arnold and Roger Libby, "Semantics of Sex Related Words," (unpublished paper, Illinois State University, 1970).

TABLE ONE

ATTITUDES TOWARD ORIGINAL FREEDOM
OF EXPRESSION FOR EDUCATION

Education Level	Number	Mean
6 grade or less	3	17.33
Junior High School	22	13.22
High School	254	13.27
1 year of College	72	13.30
2 years of College	91	13.54
3 years of College	60	11.95
4 years of College	113	12.23
Graduate Study	101	12.08

Source of Variance	df	SS	MS	F
Group	7	319.29	45.61	2.49*
Within	708	12950.54	18.29	
TOTAL	715	13269.83		

*$p < .05$

TABLE TWO

ATTITUDE TOWARD ORIGINAL FREEDOM
OF EXPRESSION FOR PARTY

Party	Number	Mean
Democratic	218	13.03
Republican	218	13.67
Independent	260	12.25

Source of Variance	df	SS	MS	F
Group	2	244.57	122.29	6.71*
Within	693	12636.89	18.23	
TOTAL	695	12881.47		

*$p < .05$

TABLE THREE

ATTITUDES TOWARD REWRITTEN FREEDOM
OF EXPRESSION FOR PARTY

Party	Number	Mean
Democratic	218	9.74
Republican	219	10.66
Independent	260	9.28

Source of Variance	df	SS	MS	F
Group	2	231.09	115.55	10.25*
Within	694	7821.10	11.27	
TOTAL	696	8052.20		

*p < .01

TABLE FOUR

ATTITUDES TOWARD REWRITTEN FREEDOM
OF EXPRESSION FOR OCCUPATION

Occupation	Number	Mean
Professional	196	10.05
Administrative	80	10.26
Blue Collar	109	9.25
Self Employed	44	10.00
Housewife	160	10.19
Student	64	8.60
Retired	14	10.50
White Collar	16	10.12
Other	16	9.37

Source of Variance	df	SS	MS	F
Group	8	188.57	23.57	2.05*
Within	690	7925.41	11.49	
TOTAL	698	8113.99		

*$p < .05$

TABLE FIVE

ATTITUDES TOWARD REWRITTEN FREEDOM
OF EXPRESSION FOR AGE

Age	Number	Mean
18-25	275	9.30
26-33	152	9.77
34-41	100	10.21
42-49	88	10.60
50-57	55	9.64
58-65	27	10.74
65+	24	11.25

Source of Variance	df	SS	MS	F
Group	6	214.94	35.82	3.14*
Within	714	8139.74	11.40	
TOTAL	720	8354.68		

*$p < .05$

TABLE SIX

MEANS FOR INDIVIDUAL ATTITUDE ITEMS FOR ALL SUBJECTS
ON FREEDOM OF SPEECH

Rewritten	Mean
The Federal Government should make no law abridging the freedom of expression (defined as any written or spoken word).	2.49
The Federal Government should make no law abridging the freedom of expression (defined as any symbolic act) of its citizens.	2.68
The Federal Government should make no law abridging freedom of expression.	2.45
The Federal Government should make no law that violates any organization's rights as guaranteed in the Constitution of the United States.	2.23
GRAND MEAN	2.46
Original	
The Federal Government should make no law abridging the right of the people to petition the government for a redress of grievances.	2.21
The Federal Government should make no law abridging freedom of the press.	2.34
The Federal Government should make no law abridging the freedom of speech.	2.27
The Federal Government should make no law prohibiting the free exercise of religion.	1.78
The Federal Government should make no law abridging the right of the people to peaceably assemble.	2.07
The Federal Government should make no law respecting an establishment of religion.	2.21
GRAND MEAN	2.15

T = 6.53 for grand mean

TABLE SEVEN

ATTITUDES TOWARD THE FLAG
FOR AGE

Age	Number	Mean
18-25	275	11.86
26-33	152	11.01
34-41	100	11.04
42-49	88	10.87
50-57	54	10.48
58-65	27	9.77
65+	24	10.41

Source of Variance	df	SS	MS	F
Groups	6	234.61	39.10	6.70*
Within	713	4158.17	5.83	
TOTAL	719	4392.78		

*p < .01

TABLE EIGHT

ATTITUDES TOWARD THE FLAG
FOR EDUCATION

Educational Level	Number	Mean
6 Grade or less	3	11.33
Junior High School	22	11.27
High School	254	10.74
1 year of College	72	11.36
2 years of College	91	11.34
3 years of College	60	11.62
4 years of College	113	11.53
Graduate Study	101	11.60

Source of Variance	df	SS	MS	F
Group	7	97.23	13.89	2.30*
Within	708	4277.34	6.04	
TOTAL	715	4374.57		

*$p < .05$

TABLE NINE

ATTITUDE TOWARD THE FLAG
FOR PARTY

Party	Number	Mean
Democratic	218	11.05
Republican	218	10.59
Independent	260	11.84

Source of Variance	df	SS	MS	F
Group	2	192.79	96.39	16.76*
Within	693	3983.64	5.75	
TOTAL	695	4176.43		

*p .01

TABLE TEN

ATTITUDES TOWARD THE FLAG
FOR OCCUPATION

Occupation	Number	Mean
Professional	196	11.21
Administrative	79	10.91
Blue Collar	109	11.30
Self Employed	44	11.09
Housewife	160	10.61
Student	64	12.62
Retired	14	10.71
White Collar	16	11.19
Other	16	12.19

Source of Variance	df	SS	MS	F
Group	8	212.40	26.53	4.57*
Within	689	4002.15	5.81	
TOTAL	697	4214.39		

*p < .05

TABLE ELEVEN

MEANS FOR INDIVIDUAL ATTITUDE ITEMS FOR ALL SUBJECTS ON THE FLAG

Flag	Mean
The flag of our country should be fought and if necessary died for.	3.54
Anyone carrying or displaying a red or black flag or banner or displaying a flag of any anarchistic society should be arrested.	3.17
Anyone burning or desecrating the American flag should be imprisoned or fined.	2.38
Students shouldn't be punished if they deface the American flag.	2.21
GRAND MEAN	11.20

T = 6.54 for grand means

RESPONSIBILITY AND SURVIVAL: FREE EXPRESSION AND POLITICAL BROADCASTING ON PUBLIC RADIO AND TELEVISION STATIONS

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Presumably, Public Broadcasting, the nation's non-commercial publicly financed radio and television stations, exist to provide an alternative to the commercial system of broadcasting. It follows logically that its approach to the coverage of political campaigns and other controversial subjects could offer viable alternatives in the form, time, and content devoted to such matters.

However, the public broadcaster has frequently found that airing politically controversial material has been accompanied by peril to the very survival of the public broadcasting medium itself. This article seeks to identify the mission of public broadcasting with respect to political coverage, the history and regulations which both support and impinge on this mission, and the assault on public broadcasting as a result of attempts to fulfill its promise to enlighten the electorate.

The 1967 Report of the Carnegie Commission on Educational Television, which led directly to the federal legislation creating our current system, regarded coverage of contemporary affairs as an essential part of public television. The commission reported that "public television can extend our knowledge and understanding of contemporary affairs. Its programming of the news should grow to encompass both facts and meaning, both information and interpretation."[1] To the commission, public television was the instrument that could provide the depth of understanding lacking in the encapsulated news packaged by the commercial networks.

Broadcasting has always had relatively fewer freedoms than other media. Primarily, the justification for such regulation has been founded on the concept of a relatively limited frequency spectrum belonging to the people as a natural resource. Anyone could start a newspaper, the theory goes, but only a few could enter the limited air space available for radio and television. Statistics belie the theory since more than seven thousand radio stations and nine hundred plus television stations are currently on the air in comparison to about 1,260 daily newspapers.

In the case of Public Broadcasting, freedoms have been constricted even further. For example, a provision of the Public Broadcasting Act of 1967 prohibits editorials by non-commercial stations.[2] This is a

freedom won more than twenty years ago by commercial broadcasters after an eight year battle with the Federal Communications Commission over its 1941 Mayflower decision banning the right of advocacy for broadcast licensees.[3] In its 1949 report, "Editorializing by Broadcast Licensees," the FCC declared that because of the public's right to be informed, it was the "affirmative duty" of the licensee to seek out controversy, take stands on issues, and afford opportunity for those holding contrary views.[4]

It is the libertarian assumption that being presented with all manner of evidence and opinion to serve as a basis for making political decisions undergirds the American political process. Yet in commercial broadcasting, relied upon by so many Americans for their primary source of news,[5] the over-abundance of political information is directly attributable to paid advertising from the candidates themselves. The free flow of information has become a paid stream of political commercials.

POLITICS AND PUBLIC BROADCASTING

Curiously, the political broadcasting issues to which various foundations, study groups, academicians, political observers, and the Congress have been addressing themselves have centered exclusively on the functions, responsibilities, and obligations of the commercial broadcasters. Little has been said about the nation's non-commercial "educational" or "public" broadcasting establishment.

E.B. White, in an introductory note to the Carnegie Commission Report that ultimately led to the establishment of "public" broadcasting, dreamed that public television "...should be our Lyceum, our Chautauqua, our Minsky's and our Camelot. It should restate and clarify the social dilemma and political pickle. Once in a while it does, and you get a quick glimpse of its potential."[6]

More recently a special task force of the National Association of Educational Broadcasters proposed that:

> ...Educational Broadcasting can be a major instrument in the improvement in the political process, defined narrowly in terms of party campaigning and governmental decisions. It can slow down, perhaps even reverse, the trend toward emphasizing politicians' access to the media rather than the people's access to the politicians. By providing the voters opportunities to see the candidates exposed to sharp questionings, interviews and discussions, educational /public/ broadcasting can work to make campaigning more nearly a species of discussion, debate, examination and education, and less a species of advertising....[7]

How, then, has public broadcasting responded to its potential to serve the political process? In 1968 Mendelsohn and Muchnik conducted a mailed questionnaire survey of public television executives whose stations were reported to have been on the air during the election campaign. Of the 163 stations on the air during the campaign period, 133 respondees reported that they devoted less than two per cent of all programming to the 1968 election campaign. Reasons cited by station executives (44 per cent claimed commercial television was doing an adequate job while 31 per cent reported that it was the explicit policy of their station not to cover political campaigns) led to the conclusion that public television was not providing alternatives to the political broadcasting practices of commercial television.[8] In fact, 69 per cent of the public television executives rated their own station's efforts as "fair" or "poor" while only 13 per cent considered coverage of the political campaign "excellent" or "good."

In addition a series of interviews by Muchnik in 1971 and 1972 with individuals involved in creating public policy in this area have identified several perceptions and extra-legal constrictions upon public broadcasters including (1) the lack of a permanent financing plan, (2) the lack of hope that sufficient funds will ever be provided, (3) the background of those involved in public broadcasting, (4) varied views on the mission of public broadcasting, and (5) the small size of the public broadcasting audience.

One could also analyze the laws and regulations surrounding public broadcasting to determine whether they actually serve the political process by promoting or inhibiting free speech principles. Besides considering the regulatory framework that applies to all of broadcasting, commercial and non-commercial alike (for example, Section 315 of the Communications Act of 1934, the FCC's Fairness Doctrine, and the Red Lion decision, those cases involving citizen's groups standing before the FCC at the time of license renewal) there are areas peculiar to public broadcasting.

Two in particular will be considered in this article. The first involves a State's attempt to ban programs of a political nature, an attempt that has since been ruled unconstitutional. The second which pales all other free speech considerations by comparison is concerned with the funding of Public Broadcasting itself.

STATE OF MAINE v. UNIVERSITY OF MAINE

The only court test of a state's authority to exclude political or controversial programming on an educational or public broadcast facility occurred in Maine where a state statute expressly forbade such programming. The Supreme Court of the State found otherwise.

The Maine State Legislature in 1961 enacted the ETV Enabling Act creating the Maine Educational Television Network and authorizing the University of Maine to implement provisions of the Act. A controversial provision prohibited the Maine network from broadcasting programs which in any way promoted political and governmental activities.[9]

By late 1969, the Maine Educational Television Network was heavily involved in public affairs programming and formulated plans to have all major candidates in the June, 1970 primary make appearances on the network. National political candidates as well as documentary and discussion programs which could be related to programs of governmental action had already been carried on the Maine network though originated from national and regional programming sources. No objection was raised, however, until the governor of Maine began bi-monthly televised press conferences on the Maine Educational Television Network in April, 1969. When the Maine ETV Network announced plans for extensive coverage of the forthcoming primary in June, 1970, the attorney general of the state, who incidentally was also a candidate for governor, offered an informal opinion that the broadcast plans might be in violation of state law. Following the actual appearance of the first candidate, the attorney general moved to enforce the state statute.

The University of Maine, as licensee, then agreed to abandon its broadcast plans and to have the matter adjudicated in the state Supreme Court. The University case consisted of three major arguments:

(1) the First Amendment of the U.S. Constitution guaranteeing freedom of speech and free press;
(2) federal preemption of broadcast legislation and regulation;
(3) vagueness of the language intent of the state statute.[10]

According to Charles Herbits, former Program Director of the Maine Educational Television Network, the Maine statute was "...A well intentioned effort to avoid the possibility of one administration or another dominating unfairly the non-commercial network as a direct result of the governor's authority to create an educational broadcasting council."[11] But the well intentioned effort backfired as soon as the network attempted to perform its responsibilities in the coverage of controversial issues of public importance as specified by federal law.

The Federal Communications Commission, agreeing with the position of the Maine Educational Television Network and the University of Maine as licensee, petitioned the Maine Court and entered the case by filing a memorandum amicus curiae noting "...the serious ramifications with respect to the Commission's licensing responsibilities in the field of non-commercial educational television under the specific directives of Section 315 of the Communications Act...and the commission's Fairness Doctrine as well as the public interest standard act generally...."[12]

The Commission summated its own position, the words of the Congress and the Red Lion decision of the U.S. Supreme Court that "there is a two-fold duty laid down by the /Commission/...the broadcaster must give adequate coverage to public issues...and coverage must be fair and that it accurately reflects the opposing views."[13]

It was equally clear, according to the Commission, that this same two-fold duty applied to both commercial and non-commercial educational stations with the one specific exception of new Section 399 of the Communications Act which bans editorial opinion by non-commercial licensees. But here, too, the Commission noted the prohibition on editorializing was only with respect to the opinion of management and was not intended to exclude the presentation of controversial issues by non-commercial educational broadcasting stations.

The Maine Supreme Court's decision at the end of June, 1970 opined:

> In today's world nearly all important political and social issues are the subject of either "existing or proposed" program of "governmental action." Thus obedience to that statute would deprive licensee's viewers of any informational programs of this nature.
>
> In contrast, the requirements which the defendant must meet in order to retain and renew its license include the furnishing of a reasonable and adequate number of programs of the very nature prohibited /by the Maine statute/.[14]

The question of whether prohibitions on outright federal prior restraint of programming left the states free to censor programs within their borders was dispelled by the Court's citation of Allen B. Dumont v. Carroll (340 U.S. 929 /1949/). In this case, the U.S. Supreme Court held that prohibition on censorship by the Federal Communications Commission did not mean that the states were free to censor since Congress had fully occupied the field.[15]

The Court further noted that the "public interest" was the guiding standard for broadcast licensees and cited the language of the Red Lion decision that authorized "...the Commission /to/ require licensees to use their stations for discussion of public issues...."[16]

As to the argument that the state's funding of the Maine ETV Network gave it a right to control the network's programming, the Court found that no supporting precedent had been cited for such a position and the Court's own research uncovered no such precedent. Finally, the Court concluded:

> ...The "public interest" standard is as binding upon non-commercial licensees as it is upon those who operate for profit. The designation of their license activities as "education, television broadcasting" would indeed be a misnomer if state law could effectively preclude them from presenting programs which are by their very nature essential to the educational process. In our view, although the state has a valid surviving power to protect its citizens in matters involving their health and safety or to protect them from fraud and deception, it has not such valid interest in protecting them from the dissemination of ideas as to which they may be called upon to make an informed choice. In the latter area, Congress has preempted the field... it would be impossible for the defendant to obey the rigid censoring requirements of the Maine statute and at the same time satisfy the "public interest" standard requisite for F.C.C. licensing.[17]

Unfortunately, the Maine Supreme Court did not rule on the First Amendment questions raised by the University of Maine. Conceivably, a state court opinion ruling that the Maine statute violated First Amendment principles could have been extended to the Federal level in challenging Section 399 banning editorializing by non-commercial licensees.

The Maine decision not only noted that the government had pre-empted the field of broadcast regulation, but suggested that such regulation of programming the coverage of political and controversial issues was inconsistent with the public interest. Particular reaffirmation was made of the responsibility of educational stations to cover political and controversial issues.

FUNDING OF PUBLIC BROADCASTING

The funding problems of Public Broadcasting came to a head two years to the day after the Maine Supreme Court decision. Then President Nixon vetoed a two year $165 million appropriation bill for the Corporation for Public Broadcasting. The theory behind the Bill was that funding in periods of two or more years could provide a degree of insulation not possible with an annual appropriation.

A long-range financing plan was initially supported in the early days of the Nixon administration. But then the administration objected to creation of the National Public Affairs Center for Television and to its senior correspondents Sander Vanocur and Robert MacNeil. It questioned whether programs of controversy should properly be aired on public broadcast outlets and also raised the issue of excessive centralization by the Corporation for Public Broadcasting.

The Carnegie Commission of 1967 had envisaged insulation in the funding of public broadcasting that would protect this alternative broadcast service from attempts at political control. The commission's initial funding proposal was for the levying of an excise tax on television receivers.

In subsequent Congressional hearings considering the Public Broadcasting Act of 1967, others expressed concern about funding mechanisms and the potential for political control of or reprisals for programming. Current Senate Minority Leader Hugh Scott, worried about the potential for federal control, suggested shifting emphasis to the private enterprise phase of the bill to ensure that the Corporation for Public Broadcasting (CPB) had the maximum protection in its programming efforts: "...the protection of the oddball, beatnik, crackpot, jackass, fool; the right to be unpleasant, to be different, to be arrogant, to be wrong."[18]

The American Civil Liberties Union was cautious in its provisional endorsement of the bill, calling for safeguards to ensure the diversity of ideas. One safeguard proposed was that a blue ribbon panel rather than the President choose the members of the Corporation. A year after passage of the Bill, the ACLU urged adoption of a tax revenue base to support Public Broadcasting.[19]

Fred Friendly, former CBS news director, also worried about political influence and the funding process, suggested that no government money should be involved in that portion of public broadcasting devoted to public affairs programming. While not providing a way of administering his proposal, Friendly warned, "Of one thing we can be certain: Public Television will rock the boat...but public television should not have to stand the test of political popularity at any given point in time. Its most precious right will be the right to rock the boat."[20]

And so it came to pass a scant five years later that public television and radio did rock the Nixon boat and the reprisals occurred as predicted.

The Nixon administration's attacks on public television have come primarily through its Office of Telecommunications Policy. Antonin Scalia, OTP General Counsel, suggested that some kinds of controversial programming may be acceptable, particularly at the local level. In a Washington interview with this author in May, 1972, he went on to note that "the closer you get to documentary, the more trouble there will be with funding." Then should public television stay clear of political or controversial programming? Scalia replied, "I am not saying it should. It will if it doesn't want to commit suicide. I hate to see it go down the drain by doing this kind of programming, at least the way things are currently set up."[21]

A little more than a month later the not-so-veiled threat of political intrusion was uncloaked in the form of a Nixon veto of a two-year funding proposal initially promised by the Administration itself. The veto led to the resignation of John Macy, President of the Corporation for Public Broadcasting.

Ironically Henry Loomis, plucked by Nixon from the Voice of America to replace Macy as head of the Corporation for Public Broadcasting, began immediately talking about more program control by the Corporation, not less as the previous Nixon admonitions would have led one to believe. One joke at the November, 1972, national meeting of the National Association of Educational Broadcasters had the telephone in Loomis's new office being answered, "Good morning. National Center for Decentralization."

An example of how the federal government might use a national television network for its own purposes came quickly to pass after Loomis' appointment when the government offered to provide extensive government controlled coverage of the Apollo 17 Mission. One supposes that the National Aeronautics and Space Administration (NASA) worried about decreasing commercial coverage of the moon shots and facing its final Apollo mission, hoped to rally public support for its own funding. The offer, funneled by the Corporation for Public Broadcasting to local public stations, received an immediate response. In sharply rejecting the offer local stations told the federal government to stay out of programming. Mr. Loomis might recall from his Voice of America days that the Congress concerned about government control of media and its propaganda possibilities, specifically prohibited the programs of the Voice of America and the materials of the United States Information Agency from being propagated within the borders of the United States.

Nevertheless, the Corporation for Public Broadcasting began a process which seemed to be a selective non-funding of programs thought to be critical of the Nixon administration. The posture of the Administration was confirmed by presidential speech writer Pat Buchanan in an appearance on the Dick Cavett show on March 22, 1973. Noting that he personally had a hand in drafting the veto message of the previous year's funding bill, Buchanan observed:

> ...if you look at public television, you will find that you've got Sander Vanocur and Robert MacNeil, the first of whom, Sander Vanocur, is a notorious Kennedy Sychophant, in my judgment, and Robert MacNeil, who is anti-administration. You have the Elizabeth Drew show on...she definitely is not pro-administration...I would say that anti-administration Washington Week Review is unbalanced against us, and you have Black Journal which is unbalanced against us...you have Bill Moyer's, which is unbalanced against the administration. And then for a figleaf, they throw in William F. Buckley's program.[22]

Perhaps not coincidentally, most of the programs cited above were initially selected by an increasingly aggressive Corporation for Public Broadcasting, for non-funding, though some of the programs were rescued either after reconsideration following station pressure or by alternative means of funding.

In the midst of all of this, CPB attempted in early 1973 to take over many of the functions carried by the previously independent station-controlled Public Broadcasting Service (PBS) including, "...the entire decision-making process and ultimate responsibility for program production support and acquisition; pre-broadcast acceptance and post-broadcast review of programs, to determine their adherence to objectivity and balance; research and public awareness functions."[23]

Not surprisingly, the nation's 234 non-commercial television stations reacted by consolidating. They reconstituted the Public Broadcasting Service bringing several organizations together in one umbrella organization and began intensive negotiations with the Corporation for Public Broadcasting. The stakes were nothing less than the right to unhampered free expression by the public broadcasting community.

While negotiations proceeded and while the spotlight focused on Watergate with a brief indication from the White House of a rapprochement with the press, Clay Whitehead, the administration's chief communications policy spokesman appeared before the Senate Subcommittee on Communications. Whitehead cited "serious deficiencies" in public broadcasting which he later concluded mitigated against insulated funding via multi-year authorizations. Among the deficiencies he cited were centralized program decision making by CPB and PBS, a use of a network for fixed scheduling rather than for distribution of program alternatives, and the use of federal monies for public affairs programming which Whitehead called "inappropriate and potentially dangerous."[24]

At the same hearings new CPB Board Chairman Thomas Curtis alluded to impending agreement between the CPB Board and the local stations represented by the newly reformed Public Broadcasting Service. Two weeks later, Curtis resigned as Board Chairman claiming an agreed upon compromise was voted down at the last moment by the CPB Board following pressure telephone calls to its members from White House staffers.[25]

The relationship between the politically influenced and federally funded Board of the Corporation and the local stations remains somewhat in flux though a compromise solution was in the offing at the time of this writing. In addition, the Board elected Dr. James Killian as its Chairman. It was Killian who chaired the Carnegie Commission study on Educational Television and who is recognized as one of Public Broadcasting's founders. In addition, President Nixon finally signed into

law a two-year authorization with $50 million designated for fiscal year 1974, and $60 million in fiscal year 1975 with up to $5 million in matching funds each year. Also authorized was $25 million in facilities money in 1974. But the authorizations have frequently been thwarted by the appropriations process which requires final presidential approval or veto.[26]

Ironically, it was the dirge of the Senate Watergate hearings that breathed new life into public broadcasting's public affairs activities. Featuring gavel to gavel coverage of the hearings in prime television time, public stations were drawing audiences five and six times above normal, causing the Boston station to note that Watergate (and Sam Ervin) had higher ratings than the highly acclaimed production of "Elizabeth R" and Glenda Jackson. More importantly, amid letters of praise were checks to public stations totalling a third of a million dollars in the first few weeks of the hearings.[27]

What may be needed to preserve the republic is a greater diversity of ideas, not a purging of all things potentially controversial. In a complex society, what may be needed is not less servicing of our information needs, but more; not fewer ideas of how to cope with the world, but more; not less money for an alternative television service, but more.

A recently released report for the Aspen Program on Communications and Society, the first independent evaluation of public television financing since 1967, claimed that "a balanced service, responsive to diverse audience needs" would cost $432 million to operate annually or just over $2.00 per person. By comparison, non-commercial British Broadcasting Corporation spends $3.29, and a Japanese non-commercial network spends $2.90 per person. The current level for funding for public television is $.74 per person.

What seems most needed if Public Broadcasting is to fulfill its potential in contemporary affairs coverage is a solution for financing public broadcasting that will provide protection of the public medium from the whims of politicians of any political party or any political persuasion. At public broadcasting's present rate of development, according to one critic, we shall celebrate our two hundredth anniversary as a nation by watching a BBC-produced series on the American Revolution. And that revolution, you may recall, was fraught with controversy.

FOOTNOTES

[1]Carnegie Commission on Educational Television, Public Television: A Program for Action (New York: Harper and Row, 1967), pp. 95-96.

[2]Public Broadcasting Act of 1967, Public Law 90-129, which added new Section 399 to the Communications Act of 1934.

[3]In re the Yankee Network, Inc., 8 fcc 333 (1941).

[4]U.S. Federal Communications Commission, "Editorializing by Broadcast Licensees," 14 Fed Reg. 3055 (1949).

[5]The Roper surveys indicate an increase from 51 in 1959 to 60 in 1971 of Americans relying on television as a primary source of news. A recent survey by R.H. Bruskin Associates reported in Broadcasting, November 20, 1972, p. 17 indicates the figure is now 64. According to the Bruskin survey, 50% consider television the most believable source of news while 20 cite newspapers as most believable.

[6]E.B. White in Public Television A Program for Action, Report of the Carnegie Commission on Educational Television (New York: Harper and Row, 1967), p. 13.

[7]Open Forum, "Educational Broadcasting and Public Responsibility," Report from a special task force of the National Association of Educational Broadcasters, Educational Broadcasting Review, 5 (December, 1971), 21-25.

[8]Harold Mendelsohn and Melvyn M. Muchnik, "Public Television and Political Broadcasting: A Matter of Responsibility," Educational Broadcasting Review, 4 (December, 1970), 4. (See also review by Lawrence Laurent, "Public TV Stations Found Lacking on Political Coverage," Washington Post, 30 September 1970, p. A2.)

[9]Maine, ETV Enabling Act, 20 M.R.S.A. 2606 (1963).

[10]John R. Morrison and Donald R. McNeil, "State Supreme Court Rules Political Programming may not be Restricted," Educational Broadcasting Review, 4 (August, 1970), 9.

[11]Charles Herbits, Director, Business and Legal Affairs, National Public Radio, interview with Melvyn M. Muchnik, Washington, D.C., July 8, 1971.

[12]U.S., Federal Communications Commission, Petition of the FCC for leave to file a memorandum amicus curiae, May 22, 1970, Washington, D.C. in State of Maine v. University of Maine, Law Docket No. 989 (mimeo).

[13]U.S., Federal Communications Commission, "Memorandum of the Federal Communications Commission as Amicus Curiae," p. 11.

[14]State of Maine v. University of Maine, Law Docket No. 989 (Maine Sup. Ct., 1970) (mimeo).

[15]Section 326 of the Communications Act of 1934 prohibits the Commission from exercising the power of censorship or issuing regulations interfering with the rights of free speech. Section 398 created by the Public Broadcasting Act of 1967 states in part "Nothing contained in this part shall be deemed...to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting...."

[16]State of Maine v. University of Maine, Law Docket No. 989 (Maine Sup. Ct., 1970), (mimeo) citing Red Lion Broadcasting Company v. Federal Communications Commission, 395 U.S. 367 (1967).

[17]State of Maine v. University of Maine, Law Docket No. 989 (Maine Sup. Ct., 1970) (mimeo).

[18]U.S. Congress, Senate, Public Broadcasting Act of 1967, Hearing 90th Cong., 1st Sess., on H.R. 6736 and S. 1160 (Washington: Government Printing Office, 1967).

[19]Ibid. Also see Fred Powledge, "Public Television: A Question of Survival," ACLU Reports (Washington: American Civil Liberties Union, 1972), pp. A-3, A-4.

[20]U.S. Congress, House, Public Broadcasting Act of 1967, Hearings, 90th Cong., 1st Sess., on H.R. 6736 and S. 1160, July 1967 (Washington: Government Printing Office, 1967).

[21]Antonin Scala, interview with Melvyn M. Muchnik held in Washington, D.C., Office of Telecommunications Policy, May 22, 1972.

[22]U.S. Congress, Senate, Committee on Commerce, Subcommittee on Communications, Hearings on the funding of public broadcasting, 93d Cong., 1st Sess., on S. 1090 and S. 1228, March 28, 29, and 30, 1973 (Washington: Government Printing Office, 1973), p. 8.

[23]National Association of Educational Broadcasters, newsletter citing action taken by the Board of the Corporation for Public Broadcasting, January 22, 1973.

[24]U.S. Congress, Senate, Committee on Commerce, Subcommittee on Communications, Hearings on the funding of public broadcasting, 93d Cong., 1st Sess., on S. 1090 and S. 1228, March 28, 29, and 30, 1973 (Washington: Government Printing Office, 1973), pp. 86-87.

[25]"Rebuffed on Deal He Made with PBS, Curtis Quits CPB," Broadcasting, 23 April 1973, pp. 21-22; "Curtis Quits Over Those Telephone Calls," Broadcasting, 30 April 1973, pp. 31-32.

[26]National Association of Educational Broadcasters, newsletter, August 10, 1973.

[27]Cecil Smith, "Ratings Soar for Watergate on PBS," Los Angeles Times, sec. 4, pp. 1, 18.

EDITORIAL ADVERTISING: A NEW FORM OF FREE SPEECH

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Advertising is a vital part of American society. It encourages and promotes the national economy by providing information to the public about goods and services. In this way, advertising provides invaluable support to the mass media. It supports the cost of most of the news and entertainment which we receive. But advertising is not without criticism. Many critics charge that advertising is motivated only to gain profit, not to serve public needs.

In recent years, however, a new function of advertising has emerged. It is the use of paid "editorial advertisements" by individuals and citizens groups to express opinions on controversial public issues. Many who support editorial ads believe that the present structure of the mass media, especially broadcasting, does not give the individual the opportunity to speak his own views directly to the audience. Instead, the licensee or publisher retains control over format, the order of presentation, the speakers chosen, and the ideas considered presentable. As a result, advocates have turned to paid editorial ads to gain a chance to speak. In turn, the courts have been faced with a novel question: Is advertising protected by the freedom of speech and press provisions of the First Amendment? The purpose of this paper is to trace the case law on the subject to illustrate the answer the courts have provided.

Commercial Advertising Restrictions

Court cases concerning commercial advertising have been of one opinion: that commercial advertising is not protected by the First Amendment and is subject to broad governmental regulation. Moreover, the courts have been careful to distinguish between commercial and noncommercial advertising.[1]

The first Supreme Court case approving governmental regulation of commercial advertising occurred in the 1911 case of Fifth Avenue Coach Company v. New York City.[2] The Court ruled that the city could prevent advertising on the outside of double-decker buses since advertising was not essential to the transportation of the people. In 1942, the Supreme Court directly addressed the question of First Amendment applicability to advertising. The case, Valentine v. Christensen, involved a constitutional challenge to a New York City ordinance prohibiting the distribution of "commercial and business advertising matter" in public places.[3] In dismissing the constitutional challenge to the ordinance, the Court established the precedent that "purely commercial" speech is not protected under the First Amendment. After

noting the distinction between the freedom to express political views and the freedom to advertise a commercial product, the Court wrote:

> We are equally clear that the Constitution imposes no such (First Amendment) restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of the user, are matters for legislative judgement.[4]

The decision did not, however, explain how purely commercial speech differed from other forms of expression. Seventeen years later, Justice Douglas, a member of the unanimous Valentine Court, commented on the lack of analytical explanation. In a concurring opinion in Cammarano v. United States,[5] Justice Douglas challenged the idea that commercial advertising enjoys less First Amendment protection than noncommercial advertising. Calling the Valentine ruling "casual, almost offhand," he wrote:

> The profit motive should make no difference in First Amendment protection, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.[6]

Constitutional Protection for Editorial Ads

The Supreme Court in 1964 established a significant precedent by granting constitutional protection to paid "editorial ads." The conclusion was reached in the famous New York Times v. Sullivan case in which the Court overturned a $500,000 libel suit brought against the Times for alleged errors in a paid ad supporting integration.[7] But, despite the constitutional protection the commercial/noncommercial distinction remained. The Court wrote:

> The publication here was not a "commercial" advertisement in the sense in which the word was used in Christensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.... That the Times was paid for the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.[8]

The Court stated that discouragement of "editorial ads" would eliminate a vital form of expression for citizens who are not members of the press. The First Amendment, said the Court, is based on a "profound national

commitment that debate on public issues should be uninhibited, robust, and wide open."[9] Allegedly libelous statements, the Court concluded, do not forfeit constitutional protection because they were published in the form of a paid advertisement.

Thus, a legal paradox existed. The Supreme Court extended First Amendment protection to ads promoting ideas, but it did not extend constitutional protection to ads promoting products. Other decisions had held that ads for religious meetings,[10] labor union activities,[11] and political debates[12] were protected speech. These ads too, seem to fall in the category of speech promoting opinions.

The Established Forum Doctrine: The BEM Case

How has this paradox been justified? The method has been the development of an "established forum doctrine."[13] The doctrine works as follows: If a forum is available for commercial ads it must also be available for noncommercial editorial ads. To ban editorial ads would violate the constitution as a discrimination between classes of ideas, which is prohibited by the First Amendment.

The doctrine was developed in a series of lower court cases. For example, the California Supreme Court ruled that a public transit district, which sold advertising space on municipal buses, had to make the same forum available to a group called "Women for Peace" to display anti-war posters.[14] Refusal had been based on a policy accepting only commercial advertising and the fact that the copy was too controversial. A similar ruling concerning advertising space on subway platforms was reached in a New York case where the Students for a Democratic Society had been denied advertising space.[15] It is noteworthy that the cases utilizing the "established forum doctrine," all involved some form of public utility engaged in commercial advertising.[16] This doctrine was applied to broadcasting by the U.S. Court of Appeals in Washington, in Business Executives' Move for Vietnam Peace v. Federal Communications Commission.[17] The Business Executives' Move (BEM) attempted to purchase advertising time on WTOP (AM), Washington, D.C., to advocate an end to the Vietnam War. The station refused, citing a long established policy of refusing to sell spot announcements conveying controversial issues. The FCC upheld such a policy,[18] but, in overruling the Commission's decision, the Court of Appeals held that a flat ban on editorial ads violated the First Amendment. The appeals court concluded that a broadcast station which sold time for commercials must sell it for political and editorial ads.

Citing Times v. Sullivan, the court noted that:

> /a/ny other conclusion...might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities--who wish to exercise their freedom of speech even though they are

> not members of the press.... The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'[19]

"Both free speech and equal protection principles," said the court, "condemn any discrimination among speakers which is based on what they intend to say. If the First Amendment prohibits anything at all, it must be censorial discrimination among ideas."[20]

The appeals court also commented on the commercial/noncommercial distinction. Editorial ads, the court noted, are of First Amendment concern since they deal with political questions.[21] Commercial advertising, on the other hand, was observed to be less fully protected than other speech, because it generally "does not communicate ideas and is not directly related to the central purpose of the First Amendment."[22]

The appeals court concluded that the public has a limited First Amendment right of access to radio and television and directed the FCC to establish immediate procedures to determine which and how many editorial advertisements would be put on the air.[23]

The Supreme Court and Editorial Advertising

The U.S. Supreme Court reversed the appeals court opinion. In a 7-2 decision the Court held that neither the First Amendment nor the Communications Act requires broadcasters to sell time for editorial ads.[24] Chief Justice Warren E. Burger, who wrote the majority opinion said it is the fairness doctrine, which requires broadcasters to air all sides of controversial issues of public importance, that is the mechanism for informing the public on matters of public importance.[25] Moreover, he said, the lower court's decision would unduly restrict day-to-day editorial decisions of broadcast stations by removing "journalistic discretion."

Burger stressed the need to maintain a balance between holding broadcasters to a public accountability while allowing them private control of their stations. He warned that unfettered access to broadcast time might allow "the views of the affluent (to) prevail over those of others, since they would have it within their power to purchase time more frequently."[26] Then, to comply with the fairness doctrine, the Court said:

> ...a broadcaster might well be forced to make regular programming time available to those holding a view different than that expressed in an editorial advertisement.... The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer

> of control over the treatment of public issues from the licensees who are accountable to private individuals who are not.[27]

Repeatedly, Burger likened broadcasters to journalists and equated their responsibilities. He rejected the appeals court's contention that every potential speaker is the "best judge" of his views, and cited his major defense for "journalistic discretion":

> For better or for worse, editing is what editors are for, and editing is selection of choice and material. That editors--newspaper or broadcast--can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress has provided.[28]

For broadcasters, then, the key seems to be that they need not accept editorial ads as long as they treat controversial issues in a fair manner.

Conclusion

What, now is the Constitutional status of advertising? In reality, there are few solid answers for the flurry of court cases on the issue have produced varied and sometimes conflicting rulings. It must be remembered that the question of advertising's First Amendment status came about because of growing pressure to create a "right of access" to news and advertising time. As Professor Jerome A. Barron put it:

> The free marketplace of ideas is not working at all well during the latter third of the 20th Century. Competition among newspapers, magazines, and the electronic media is so diminished that only ideas acceptable to the nation's establishment can gain a hearing.... Government has an affirmative obligation to stop the discriminatory refusal of advertisements and notices.[29]

As a result, the notion that an individual could purchase time to speak his own views directly to an audience, and not through a third party trustee, has been almost eliminated. Although it is the foundation of a democratic society that the individual should openly advocate his own ideas, the Court has chosen instead to recognize the right of a station, under the FCC's fairness doctrine, to determine who shall speak on the airwaves. It is difficult to imagine that very many stations will be willing to open their advertising time to controversial ideas when they are not required to do so. If a station did choose to air such a commercial it would have to broadcast all sides of the issue. It is not likely that very many stations will choose to open their facilities to such a possibility.

It is also interesting to note the variation between the BEM decision and the earlier Supreme Court ruling in the Red Lion case. In that decision, the Court recognized the right of the public to be served by a broadcast media which operates to provide listeners with suitable access to ideas. The Red Lion Court noted that "the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[30] It stated further that "It is the right of the viewers and the listeners, not the right of the broadcasters, which is paramount...."[31] Clearly, the Court has taken the opposite approach in BEM, for stations have been given the power to decide who can broadcast. Several factors may explain the change in the thinking of the Court. One factor is that BEM deals with advertising and the fairness doctrine while Red Lion was concerned with the constitutionality of the fairness doctrine. Thus, the Court seems to have developed a double standard concerning public access to the airwaves. The Court seems to want broadcasting, through the fairness doctrine, to promote an informed citizenry. But the Court is not willing to establish strict guidelines when questions of fairness involve paid opinion. The FCC and the stations themselves are charged with the responsibility of determining when editorial ads are "fair." A major concern of the Court was that widespread use of editorial ads could undercut the financial base of broadcasting since stations might find themselves in a morass of conflicting fairness claims which would not necessarily bring in revenue. Apparently, the BEM Court felt that the fairness doctrine was sufficient to safeguard individual expression, and that editorial ads were not required.

Another factor that may have influenced the High Court to change its position on access is the complexity of the BEM case. Although the justices voted 7 to 2 to reverse the lower court, the decision was so complex that it produced six separate opinions. The Court divided on the application of the First Amendment and the Communications Act to the sale of broadcast time. Specifically, the Court ruled 4 to 2 that the First Amendment doesn't require broadcasters to accept editorial ads. Justice Burger, who wrote the majority opinion, was joined by Justices Potter Stewart and William Rehnquist on this point, while Justice William O. Douglas, who did not participate in the 7 to 0 Red Lion case, filed a separate opinion in which he argued that radio and television enjoy the same First Amendment protection as the printed press. Justices Blackmun and Powell did not express an opinion on the First Amendment issue.

By a 6 to 2 vote the Court held that the Communications Act doesn't require stations to sell editorial ads. Burger, White, Blackmun, Powell and Rehnquist formed the majority. Douglas concurred but wrote his own opinion. Brennan and Marshall dissented, while Stewart did not vote on the Communications Act question.

Legal scholars will no doubt evaluate the sharp division of opinion on the case. The applicability of either the First Amendment or the Communications Act to the issue clearly led to much difference of opinion. It may also be that the changed composition of the Court since Red Lion led to new insights into the issue of fairness.

While the decision seems to be a strong victory for the broadcast industry the decision did little to resolve the underlying legal issues. As Justice Burger noted, the basic Constitutional issue is "not whether there is to be discussion of controversial issues of public importance... but rather who shall determine what issues are to be discussed by whom, and where."[32] The ruling seems to place that decision in the hands of the licensee, but in recent years, an increasing number of cases relating to fairness have found their way to the FCC. If stations carry editorial ads, which seems unlikely, it is probable that the FCC will be asked to decide cases bearing on the fairness of the editorial decisions. In short, the Supreme Court has given broadcasters no guidelines to determine which speakers and which issues are acceptable.

The decision also did nothing to clarify the commercial/non-commercial distinction. Ads promoting products seem to be given a lower order of First Amendment protection than ads promoting ideas. The BEM decision seems to follow this notion for an individual can broadcast an editorial opinion if he can find a station to carry it. But what about product commercials? They seem to communicate beliefs and attitudes about tangible objects. Aren't these ideas? The Supreme Court gave no answers even though this is the heart of the broad issue of advertising and the First Amendment.

While it may seem that the BEM decision provided the death blow to editorial ads, it should be noted that a limited right of access seems to exist, particularly regarding advertising on municipal facilities (buses, subways, etc.). Most lower court cases involved editorial advertising on public facilities and the courts have forbidden public agencies to prohibit such advertising. Also, the Supreme Court noted in BEM that a limited right of access for broadcasting might be devised at some future date by Congress or the FCC, especially with respect to the opportunities for discussion of public issues brought by cable television.[33] The concept of a limited right of access has not been rejected. It is really a question of how and when to implement it.

FOOTNOTES

[1]Primary data concerning the cases cited herein was obtained from the decisions as cited in the federal reporter system: United States Reports, Supreme Court Reporter, Lawyers' Edition of the United States Supreme Court Reports, Federal Reporter, Federal Supplement, Federal Rules Decisions, American Law Reports. Information concerning interpretations of the decisions was derived from a thorough search of

articles and listings of cases in the Freedom of Information Digest, Journalism Quarterly, and law journals. Of particular use was Harold L. Nelson and Dwight L. Teeter, Jr., Law of Mass Communication (Mineola, N.Y.: Foundation Press, 1969), which presents a thorough analysis of the law of advertising.

[2]221 U.S. 467 (1911).

[3]316 U.S. 52 (1942).

[4]Ibid., at 54.

[5]358 U.S. 498 (1959).

[6]Ibid., at 514.

[7]376 U.S. 254 (1964).

[8]Ibid., at 266.

[9]Ibid., at 270.

[10]Martin v. City of Struthers, 319 U.S. 141 (1943).

[11]Thornhill v. Alabama, 310 U.S. 88 (1940).

[12]Schneider v. New Jersey, 308 U.S. 147 (1939).

[13]See "Media and the First Amendment in a Free Society," 60, Georgetown Law Journal, 867, 965 (1972).

[14]Wirta v. Alameda--Costa Transit District, 68 Cal. 2d 51, 64 Cal. Rptr. 430, 434 p. 2d 982 (1967).

[15]Kissinger v. New York City Transit Authority, S.D.N.Y., 274 F. Supp. 438 (1967).

[16]See also Lee v. Board of Regents of State Colleges, W.D. Wis., 306 F. Supp. 1097 (1969), affirmed, 7 Cir., 441 F. 2d. 1257 (1971); Zucker v. Panitz, S.D.N.Y. 299 F. Supp. 102 (1969); Hillside Community Church, Inc. v. City of Tacoma, 76 Wash. 2d 63, 455 p. 2d 350 (1969).

[17]450 F. 2d 642 (1971).

[18]Business Executives' Move for Vietnam Peace, 25 F.C.C. 2d (1970).

[19]450 F 2d 642, at 658.

[20]Ibid., at 660.

[21]Ibid., at 658.

[22]Ibid., cited in footnote 38.

[23]Ibid., at 646.

[24]Columbia Broadcasting System, Inc. v. Democratic National Committee. Federal Communications Commission v. Business Executives' Move for Vietnam Peace. Post-Newsweek Stations v. Business Executives' Move for Vietnam Peace. American Broadcasting Company v. Democratic National Committee, --US--, 36 L Ed 2d 722, 93 S Ct--. The decision came in two related cases. One the BEM case, the other a request by the Democratic National Committee that broadcasters be required to seel time for comment on public issues. CBS and ABC joined the FCC and Post-Newsweek Stations, licensee of WTOP, in appealing the appeals court's decision.

[25]In Red Lion Broadcasting Co. v. FCC, 395 U.S. 375 (1969), the Supreme Court upheld the Constitutionality of the Fairness Doctrine.

[26]--US--, 36 L Ed 2d 772, 795, 93 S Ct--.

[27]Ibid., at 796.

[28]Ibid.

[29]Jerome A. Barron, "Access to the Press--A New First Amendment Right," 80, Harvard Law Review, 1641 (1967).

[30]395 U.S. 375, 390 (1969).

[31]Ibid.

[32]--US--, 36 L Ed 2d 722, 800, 93 S Ct--.

THE HISTORICAL DIMENSION OF FREE SPEECH: SUGGESTED READINGS

John Lee Jellicorse and Robert D. Harrison

> It is thanks to historical development and the common possession of basic values resulting from this development, that such a large measure of agreement exists in the western world on the value of democracy and, included therein, of freedom of speech.
> --Frede Castberg, 1960

This list of suggested readings is designed to supplement legally oriented works such as the textbooks authored or edited by Haiman, Bosmajian, and O'Neil; the contemporary legal-philosophical treatises such as those by Chafee, Meiklejohn, and Emerson; and the standard anthologies of cases such as those by Konvitz; and Freund, Sutherland, Howe, and Brown. Special emphasis is on American social and cultural historical developments prior to World War One and the Espionage Acts, the point at which most contemporary surveys of free speech begin.

Overviews

Issues of sovereignty, participation, and freedom of speech and press are part of the broad story of freedom narrated by Herbert J. Muller in Freedom in the Ancient World (New York: Harper, 1961); Freedom in the Western World (New York: Harper, 1963); and Freedom in the Modern World (New York: Harper, 1966). Among speech communication anthologies, Haig A. Bosmajian's has the most extensive historical section, including selections from Milton, Mill, "Cato," and documents re the Alien and Sedition Acts and the abolitionist period. The Principles and Practice of Freedom of Speech (Boston: Houghton, 1971). Among the legally oriented anthologies, the most valuable historically and bibliographically is Thomas I. Emerson, David Haber, and Norman Dorsen, Political and Civil Rights in the United States, (3rd ed.; Boston: Little, 1967). Among the legal-philosophical treatises, the works of Zechariah Chafee, Jr., Thomas I. Emerson, and Alexander Meiklejohn have historical depth, but the authors' contemporary emphases and topical patterns of organization do not communicate a sense of historical development and continuity. After almost half a century, the single most valuable book to balance the American record historically is Leon Whipple, The Story of Civil Liberty in the United States (1927; rpt. Westport, Conn.: Greenwood Press, 1970). Whipple's listing of incidents of dissent and suppression throughout American history is an excellent beginning point for the student interested in the social and cultural history of free speech.

General Histories of Civil Liberties

All of the civil liberties have received historical attention. Although it is a sloppy book, with a bias towards "clear and present danger" as the final definition of the First Amendment, Edward G. Hudon's Freedom of Speech and Press in America (Washington: Public Affairs Press, 1963) is a useful survey. The freedom of the press is covered in much more detail in William L. Chenery, Freedom of the Press (New York: Harcourt, 1955); Frank Thayer, Legal Control of the Press (4th ed.; Brooklyn: Foundation Press, 1962); and the paired anthologies, Freedom of the Press from Zenger to Jefferson (Indianapolis: Bobbs-Merrill, 1966), ed. Leonard Levy; and Freedom of the Press from Hamilton to the Warren Court (Indianapolis: Bobbs-Merrill, 1967), ed. Harold L. Nelson.

Freedom of association is surveyed historically in Charles E. Rice, Freedom of Association (New York: New York Univ. Press, 1962), and in Glenn Abernathy, The Right of Assembly and Association (Columbia: Univ. of South Carolina Press, 1961). Freedom of religious belief is covered in J.B. Bury, A History of Freedom of Thought (2nd ed.; New York: Oxford Univ. Press, 1952); J.M. Robertson, A Short History of Free-Thought (New York: Russell and Russell, 1957); and William H. Marnell, The First Amendment: The History of Religious Freedom in America (Garden City, N.Y.: Doubleday, 1964). The standard work on the history of academic freedom is Richard Hofstadter and Walter P. Metzger, The Development of Academic Freedom in the United States (New York: Columbia Univ. Press, 1955), and the history of loyalty oaths is detailed in Harold M. Hyman, To Try Men's Souls: Loyalty Tests in American History (Berkeley: Univ. of California Press, 1959). Historical background re libel is included in Clifton O. Lawhorne's Defamation and Public Officials: The Evolving Law of Libel (Carbondale, Ill.: Southern Illinois Univ. Press, 1971). Libelous words and the years in which they were considered to be libelous in the various tates are included in Philip Wittenberg, Dangerous Words: A Guide to the Law of Libel (New York: Columbia Univ. Press, 1947). See also Robert H. Phelps and E. Douglas Hamilton, Libel: Rights, Risks, Responsibilities (New York: Macmillan, 1966).

The history of obscenity and literary censorship is reviewed in Alec Craig, Suppressed Books: A History of the Conception of Literary Obscenity (Cleveland: World, 1966), and Olga G. and Edwin P. Hoyt, Censorship in America (New York: Seabury Press, 1970). Other important sources include Robert W. Haney, Comstockery in America: Patterns of Censorship and Control (Boston: Beacon, 1960); James C.N. Paul and Murray L. Schwartz, Federal Censorship: Obscenity in the Mail (New York: Free Press, 1961); David Loth, The Erotic in Literature (New York: Messner, 1961); Morris L. Ernst and Alan U. Schwartz, Censorship: The Search for the Obscene (New York: Macmillan, 1964); and Paul S. Boyer, Purity in Print: The Vice Society Movement and Book Censorship in America (New York: Scribner, 1968). See also H.M. Hyde, A History of Pornography (London: Heinemann, 1964).

The problems involved in maintaining free speech for pacifists and conscientious objectors can be traced historically in Pacifism in the United States: From the Colonial Era to the First World War (Princeton: Princeton Univ. Press, 1968) by Peter Brock; and Conscience in America: A Documentary History of Conscientious Objection in America, 1757-1967 (New York: Dutton, 1968) by Lillian Schlissel.

In addition to the standard works on the philosophy of free speech (viz. those of Milton, Locke, Jefferson, Madison, Wortman, Mill, and Bagehot), two works of special interest are Huntington Cairns, Legal Philosophy from Plato to Hegel (Baltimore: Johns Hopkins, 1949), and Carl J. Friedrich, The Philosophy of Law in Historical Perspective (Chicago: Univ. of Chicago Press, 1958).

Two relevant works re the uses of history in the legal tradition are John J. Daly, The Use of History in the Decisions of the Supreme Court: 1900-1930 (Washington, D.C.: Catholic Univ. of America Press, 1954), and Charles A. Miller, The Supreme Court and the Uses of History (Cambridge: Harvard Univ. Press, 1969).

The English and Colonial Background

An indispensable source on the English legal and philosophical background and the colonial history of free speech and press through the framing of the Constitution and the First Amendment is Leonard W. Levy's monumental Freedom of Speech and Press in Early American History: Legacy of Suppression (1960; rpt. New York: Harper, 1963). But Levy's views on seditious libel should be compared with those of Irving Brant in "Seditious Libel: Myth and Reality," New York University Law Review, XXXIX (1964), 1-19, and The Bill of Rights: Its Origin and Meaning (Indianapolis: Bobbs-Merrill, 1965). The standard source on the background of English law is still James F. Stephen, A History of the Criminal Law of England, 3 vols. (London: Macmillan, 1883). The Zenger Trial is recorded in James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, ed. Stanley N. Katz (Cambridge: Harvard Univ. Press, 1963), and Vincent Buranelli, ed., The Trial of Peter Zenger (New York: New York Univ. Press, 1957). Among the many monographs on free speech related issues during the colonial period, one of special interest to students of speech communication is Jerry L. Tarver, "Baptist Preaching from Virginia Jails, 1768-1778," Southern Speech Journal, XXX (Winter, 1964), 139-148.

Framing of the Constitution and Adoption of the Bill of Rights

The intent of the founding fathers is often made an issue in interpretation of the Bill of Rights. Among the many sources available, see esp. Saul K. Padover, The World of the Founding Fathers: Their Basic Ideas on Freedom and Self-Government (New York: Yoseloff, 1960);

Robert A. Rutland, The Birth of the Bill of Rights, 1776-1791 (Chapel Hill: Univ. of North Carolina Press, 1955); and Zechariah Chafee, Jr., How Human Rights Got Into the Constitution (Boston: Boston Univ. Press, 1952); Three Human Rights in the Constitution of 1787 (Lawrence, Kansas: Univ. of Kansas Press, 1956).

The political and social climate of free speech and press in late eighteenth-century America is indexed in Leonard W. Levy, Jefferson & Civil Liberties: The Darker Side (Cambridge: Harvard Univ. Press, 1963), and Saul K. Padover, Thomas Jefferson and the Foundations of American Freedom (Princeton, N.J.: Van Nostrand, 1965).

The Alien and Sedition Acts and Beyond

The standard works on the Alien and Sedition Acts are John C. Miller, Crisis in Freedom: the Alien and Sedition Acts (Boston: Little, 1951), and James M. Smith, Freedom's Fetters: the Alien and Sedition Laws and American Civil Liberties (Ithaca: Cornell Univ. Press, 1956).

Recently two significant and--but for Levy--forgotten turn of the century philosophers have had their works reprinted: George Hay, Two Essays on the Liberty of the Press (1799 and 1803; rpt. New York: Da Capo Press, 1970), and Tunis Wortman, A Treatise Concerning Political Enquiry and the Liberty of the Press (1800; rpt. New York: Da Capo Press, 1970).

Several issues relevant to free speech, press, and assembly are covered in James M. Banner, Jr., To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789-1815 (New York: Knopf, 1970), and Albert Z. Carr, The Coming of War: An Account of the Remarkable Events Leading to the War of 1812 (Garden City, N.Y.: Doubleday, 1960).

Nineteenth-Century Movements Prior to the Civil War

It was "the stammering century," and a survey of free speech, press, and assembly in the nineteenth century might well begin with the overview provided by Whipple and by Gilbert Seldes' The Stammering Century (1928; rpt. New York: Harper, 1965).

Conflicts surrounding the abolitionist movement were the most crucial for freedom of speech and press, of course. Important studies include Russel B. Nye, Fettered Freedom (East Lansing: Michigan State Univ. Press, 1963); Clement Eaton, The Freedom-of-Thought Struggle in the Old South (1940; rpt. New York: Harper, 1964); Leonard L. Richards, "Gentlemen of Property and Standing": Anti-Abolition Mobs in Jacksonian America (New York: Oxford Univ. Press, 1970); and W. Sherman Savage,

The Controversy over the Distribution of Abolition Literature: 1830-1860 (Washington: Association for the Study of Negro Life and History, 1938).

Another early movement in which a number of efforts at suppression occurred was the nativist movement. See Ray Allen Billington, The Protestant Crusade 1800-1860: A Study of the Origins of American Nativism (New York: Macmillan, 1938).

The Civil War

All of the wars of the nineteenth century provoked instances of dissent and suppression. Most study of wartime civil liberties controversies in the nineteenth century has been directed towards the Civil War, however. Major works are those by Dean Sprague, Freedom Under Lincoln (Boston: Houghton, 1965), and J.G. Randall, Constitutional Problems Under Lincoln (2nd ed.; Urbana:Univ. of Illinois Press, 1951). For related issues, see Frank Klement, The Copperheads in the Middle West (Chicago: Univ. of Chicago Press, 1960); Brother Basil Leo Lee, Discontent in New York City, 1861-1865 (Washington, D.C.: Catholic Univ. of America Press, 1943); and Edward Needles Wright, Conscientious Objectors in the Civil War (1931; rpt. New York: Barnes, 1961).

Re the adoption of the Fourteenth Amendment, see J.B. James, The Framing of the Fourteenth Amendment (Urbana: Univ. of Illinois Press, 1956).

Controversy and Conflict From the Civil War to the Espionage Acts

This was an era rich with dissent, violence, censorship, and suppression. It was the total climate of this era and not just the World War One sedition trials that shaped the twentieth-century controversies over free speech. Unfortunately, the details of the period have been covered only in general works, the best of which is Whipple's history of civil liberties (see pp. 169-324), or they have been drawn into works the emphases of which are either outside of the era or not directly relevant to free speech, press, and assembly. See, however, John P. Roche, "American Liberty: An Examination of the 'Tradition' of Freedom," Aspects of Liberty, ed. Milton R. Konvitz and Clinton Rossiter (Ithaca: Cornell Univ. Press, 1958), pp. 129-162; J. Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (Madison: Univ. of Wisconsin Press, 1956); William Preston, Jr., Aliens and Dissenters, Federal Suppression of Radicals, 1903-1933 (Cambridge: Harvard Univ. Press, 1963); and Lewis A. Coser, Continuities in the Study of Social Conflict (New York: Free Press, 1967). Copious original sources, particularly periodical literature exist; and a survey of the files of The Independent, The Nation, The Outlook, The Literary Digest, The Survey, and The Arena reveals the tremendous range of free

speech, press, and assembly controversies that lie just at the threshold of the contemporary law that is taught in most free speech courses.

Civil Liberties in Other Nations

Another area of significance that is relatively unexplored is the history of the international aspect of free speech. The intercultural dimensions of freedom of expression may be one of the most essential areas of study in the last decades of the twentieth century. Among previously published works in this area are Frede Castberg's historical and topical comparison of free speech in Germany, France, and the United States in Freedom of Speech in the West (Oslo: Oslo Univ. Press, 1960), and A.S. Bedi's Freedom of Expression and Security: A Comparative Study of the Function of the Supreme Courts of the United States of America and India (New York: Asia Publishing House, 1966). See also William O. Douglas, We the Judges: Studies in American and Indian Constitutional Law from Marshall to Mukherjea (Garden City, N.Y.: Doubleday, 1956).

THE SUPREME COURT AND THE FIRST AMENDMENT: 1972-1973

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I. The 1972-73 Term in Review

The decisions of the Supreme Court during the past term should have surprised no one. Given the approach to law which President Nixon assured the electorate his appointees would have, the Court has gratified the President's wishes and presumably made him proud of his choices: Burger, Blackmun, Powell, and Rehnquist. The Court has acted generally as conservatives had hoped and as liberals had feared. Of the approximately 150 cases disposed of by formal opinions the only notable deviations from the predictable came in the now famous abortion decision and a Denver busing case. Apart from those opinions there is a consistent picture of moderation and restraint. At least one of the swing justices (Stewart or White) has joined the Nixon four when the going got close and assured the five votes necessary and frequently mustered to enable the Nixon four to prevail.

In contrast to the previous term the Court generally avoided First Amendment cases until on June 21 when they handed down five cases on obscenity which partly abandoned past standards and purportedly led the nation out of an atmosphere of pornographic pollution but more likely into a jungle of tangled confusion. The decisions came in a California case involving unsolicited "adult" advertisements; a Georgia case involving an injunction against a film shown in a theatre restricted to adults; and cases involving a California "adult bookstore," the importation through U.S. customs of a film, and the interstate transportation of a film into Wisconsin.

The present Court had been in unanimous agreement that the legal definition of obscenity was inadequate and the procedures for coping with the problem a hopeless failure. They were to differ sharply on how to proceed.

The judicial confusion over the obscenity muddle dates back to Roth v. U.S., 354 U.S. 476 (1957) which held that obscenity, although expression, is unprotected under the First and Fourteenth Amendments from state or federal infringement. Since imprecision characterized the Roth definition of obscenity the Court was unable to separate obscenity from other sexually oriented but constitutionally protected speech so that censorship of the former did not result in suppression of the latter.

Five members of the Court agreed in the Roth case that obscenity could be determined by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." Agreement was short lived. By 1967 Justices Douglas and Black were consistently maintaining that government is powerless to regulate any sexually oriented matter on the ground of obscenity. Ginzburg v. U.S., 383 U.S. 463 (1966) (dissenting opinion). Justice Harlan,on the other hand, supported more latitude for the government to ban "any material which, taken as a whole has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material." Jacobellis v. Ohio, 378 U.S. 204 (1964). Meanwhile Justice Stewart was contending that federal and state authority was limited to "hard-core" pornography. Ginzburg v. U.S., 383 U.S. 497.

Prior to June 21, 1973, the view that enjoyed the most, but not majority, support was a modification of the Roth test in Memoirs v. Massachusetts, 383 U.S. 413 (1966). Here Justices Warren, Fortas, and Brennan expressed the view that the government could control the distribution of material where "the dominant theme of the material taken as a whole appeals to a prurient interest in sex; the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and the material is utterly without redeeming social value." However, this very formulation concealed differences of opinion which were to come out in subsequent cases. Confronted with these divergent views the Court began the practice in 1967 in Redrup v. New York, 386 U.S. 767 (1967) of per curiam reversals of convictions when at least five justices, applying their separate tests, declared materials not to be obscene.

Now, in 1973, the Nixon four plus Byron White have produced a "new" test for pornography. It is now constitutional for states to prohibit "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller v. California. Previously, to be obscene, a work had to be "utterly without redeeming social value" but now it need only fail to be a "serious" contender for literary, artistic, political, or scientific acceptance.

The biggest boon to prosecutors presented by the Court rulings came when regulatory schemes were left to the state where a jury could measure the factual issues of prurient appeal and patent offensiveness by the standards that prevail in the community where the case is filed and not by a national standard. However, since many state obscenity statutes are conceded to be so vaguely drawn that they fail to provide clear notice of what is banned, the Court prescribed that only "works which depict or describe sexual conduct" can be outlawed and that conduct "must be specifically defined by state law." Although Burger

abstained from proposing state standards, he announced in the Miller case "a few plain examples" of what would constitute precise statutory language describing outlawed conduct.

The argument that states have no right to prohibit that which has not been proved harmful did not trouble Burger. He acknowledged the legislative power to enact regulatory laws on the basis of unprovable assumptions and found sufficiently in local determination that a connection "might" exist between antisocial behavior and obscene material. Prosecutors need not even produce expert testimony that offending material is obscene.

Government regulatory powers were further strengthened by rulings that officials can prohibit importation and transportation of pornography across state lines on public carriers even for personal use. Also, obscenity was declared illegal even when offered to "adults-only."

Justice Douglas, who dissented in all five cases, wrote vigorous objections to the holdings of the Court majority. He accused the five member majority of substituting their values for the literate of the day. He regarded obscenity as an indefensible hodgepodge which is unmentioned in the Constitution or Bill of Rights. Only by constitutional amendment would he allow censorship. Douglas was distressed that the use of the standard "offensive" enables government to "cut the very vitals out of the First Amendment" since "that test would make it possible to ban any paper or journal in some benighted place."

Although careful study and test cases are needed before the effects of the "new" obscenity standards are known, even now certain tentative conclusions can be drawn and consequences predicted:

1. The "new" definition of obscenity shifts the burden of proof from the prosecution to the defense. Formerly the state had to produce expert testimony to prove a work without redeeming value, now the defense must produce experts to demonstrate a work's "serious" value. Even without any expert testimony Burger ruled that judges and juries may find that a work is pornographic.

2. While Burger relegated to communities the power to decide whether works are "patently offensive" and "predominantly prurient," he left uncertain the guidelines for assessing the third and newest test--"seriousness." Also, while Burger urged precise state laws on sexual conduct, he was imprecise in providing his own definition: "patently offensive representations or descriptions of masterbation, excretory functions, and lewd exhibition of the genitals" as well as "ultimate sexual acts, normal or perverted." But what Burger doesn't tell us is "patently offensive," "predominantly prurient," or "serious" according to whose or what standards

of propriety and morality. Seemingly the Chief Justice falls error to the malady which infects those who believe that meanings are found in words.

3. If pornography is to be distinguished by its literary, artistic, and scientific value, then censors must determine what is literary, artistic, and scientific. Their past judgments in making such determinations have been less than knowledgeable.

4. The rejection of a national standard for obscenity will leave book sellers and distributors uncertain about criminal liability since most states will have to redraft those laws which are presently so vague and prudish that they fail to define what is forbidden. Even with new laws, which conceivably may differ with each jurisdiction, books will be subject to the cumbersome necessity of a different edition to satisfy each different obscenity standard or face prosecution to the point that the legal fees for each separate prosecution will force a book off the market.

5. By granting local option in formulating obscenity laws the case burden on the courts should increase significantly making it likely that the Supreme Court soon will have to act again and possibly undo what it has just done.

6. Left untouched by the Court is the rule articulated in Stanley v. Georgia, 394 U.S. 557 (1969), that individuals may have anything, no matter how obscene, in their homes for private use.

7. Hard core pornography will go back underground and this likely means the inducement of graft and crime. The content of uninhibited sexual discussion in "girlie" magazines will have to be toned down. Unless magazines are willing to design different content to suit the laws of each different community, the obscenity laws of the most conservative community will control that content which can be made available to the most liberal.

8. Communities with straight-laced obscenity standards will find themselves promoting that which they reject as "banned in Boston" will flag that material which might otherwise not have presented a temptation.

9. Civil libertarians must be concerned that controversial sex education and abortion materials will be prohibited under the "offensive" standard in some locales.

We will soon know whether the sexual explosion in art and entertainment is at an end and whether the forces of puritanical repression are upon us. What we will not soon know is what this thing--"obscenity"--is and means. In the past some justices have in the absence of a workable definition for obscenity acted on the belief that they knew this "thing" when they saw it. Now they have shifted their collective inabilities to the communities so the communities might declare that they independently and differently know this "thing" when they see it.

In areas other than obscenity the Court held that First Amendment assurances did not preclude broadcasters from refusing to sell time for the presentation of views on public issues, ruled that the press cannot under freedom of the press guarantees claim the right to utilize a "help-wanted" classification system which discriminates by reference to sex, and took action under the First Amendment to protect distribution of a licensed campus newspaper which had been subjected to a regulation prohibiting "indecent speech."

II. Opinions Handed Down

Obscenity

Marvin Miller v. State of California, U.S. (1973).

The Miller Case represents one of five handed down simultaneously in an effort to clarify the relationship between the First Amendment and obscenity. Justice Burger delivered the opinion of the Court in which Powell, Blackmun, Rehnquist, and White jointed.

Under a California obscenity statute used to punish the dissemination of sexually explicit materials to unwilling recipients the trial court instructed the jury to evaluate the materials according to the contemporary community standards of California. The appellant appealed to the Supreme Court claiming that the First Amendment offered protection from the standards which were applied to identify obscene material and used to convict him.

Burger after citing the Roth case, 354 U.S. 476 (1957), which presumed obscenity to be "utterly without redeeming social value" and the Memoirs Case, 383 U.S. 413 (1966), which required the prosection to prove that alledgedly obscene material was "utterly without redeeming social value" announced that none of the justices supported these standards.

Although the Court majority recognized the dangers of regulating expression or the impropriety of proposing regulatory schemes for the states, they proceeded to do both. For the first time since the Roth case in 1957 the Court "agreed on concrete guidelines to isolate

'hard core' pornography from expression protected by the First Amendment."

Justice Burger spelled out the basic guidelines as:

a. "whether 'the average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interests."

b. "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"

c. "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value"

Under part "b" the Court gave examples of what might by state statute be regulated as "patently offensive":

a. "representations of descriptions of ultimate sexual acts, normal or perverted, actual or simulated"

b. "representations or descriptions of masterbation, excretory functions, and lewd exhibition of the genitals"

Because First Amendment limitations on the states do not vary among communities was not held to require uniform national standards pertaining to that which appeals to the "prurient interest" or is "patently offensive."

Thus, the Court reaffirmed that the First Amendment does not protect obscene material, held that the states can regulate material without having to show that it is "utterly without redeeming social value," and recognized contemporary "community" and not national standards as the test for obscenity.

Justice Douglas asked in his dissent "how under the vague tests can we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?" Douglas foresaw men being jailed for violating standards they cannot "understand, construe, and apply." He concluded that judges lack the constitutional authority to define obscenity and by so doing they deprive the people by debate of proclaiming through constitutional amendment what is obscene so that the courts will have some guidelines.

Justices Brennan, Stewart, and Marshall joined in another dissent which found the California statute in question to be unconstitutionally overbroad and invalid on its face.

Paris Adult Theatre v. Slaton, U.S. (1973).

Complaints filed on behalf of the State of Georgia sought to enjoin under Georgia law the Paris Adult Theatres from exhibiting obscene films. Although the theatre had signs posted which required patrons to be 21 and able to prove it and urged anyone not to enter if offended by the nude body, the Georgia Supreme Court characterized the films as "hard core pornography" leaving "little to the imagination" and thus unprotected by the First Amendment. The petitioners appealed from the Georgia Supreme Court's reversal of a trial court finding "that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible."

Justice Burger who delivered the opinion for the Court majority, stressed that they "do not undertake to tell the States what they must do but rather to define the area in which they may chart their own course in dealing with obscene material." The essential findings were a reaffirmation that obscene material is not speech entitled to First Amendment protection; a recognition that States may legitimately regulate commerce in obscene material and control its exhibition in places of public accommodation; a reaffirmation that commerce in obscene material is unprotected by any constitutional doctrine of privacy; a declaration that restrictions on the display of obscene material are not thought control and all conduct involving consenting adults is not constitutionally protected; and acknowledgement that States are free to adopt a laissez faire policy toward commercialized obscenity "just as they can ignore consumer protection in the market place, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction."

Justice Douglas dissented claiming he could not bring himself to conclude that obscenity is not protected speech. Government should not sit in judgment because the nature of obscenity is a matter of individual taste and like musical appreciation not reducible to precise definitions. Censorship and punishment of the obscene he contended should result only from constitutional amendment since the founding fathers had no law excluding obscenity from free expression.

Justices Stewart and Marshall joined Justice Brennan in a lengthy dissenting opinion which presented the views of those who believe the majority opinion should not have left to a case by case determination whether materials are protected. Brennan claims that state and lower federal courts without a clear standard for obscenity will resort to essentially pointless exercise until the Supreme Court assumes responsibility for an ultimate decision in this area.

U.S. v. Orito, U.S. (1973).

The appellee Orito was charged with violating a Federal statute by knowingly transportating in interstate commerce lewd, lascivious, and filthy material. The essence of his defense was that Stanley v. Georgia, 394 U.S. 565 (1968), "firmly established the right to possess obscene material in the privacy of the home and that this creates correlative right to receive it, transport it or distribute it."

The District Court held the statute void for overbreadth and the United States appealed which gave the Court the opportunity to reject the appellee's defense and establish that the zone of privacy protected by Stanley does not extend beyond the home. Congress was acknowledged to possess that power necessary to prevent obscene material, not protected by the First Amendment, from entering the stream of commerce.

Justice Douglas in his dissent agreed with the appellee that the Federal statute is too broad and in effect prohibits obscene material designed for personal use. Douglas claimed that unless Stanley, which prohibits obscenity statutes from invading the privacy of one's home, is overruled the judgment dismissing the indictment had to be upheld.

Kaplan v. California, U.S. (1973).

Kaplan as proprietor of an adult bookstore was convicted for selling to an undercover police officer an unillustrated book with repetive descriptions of sexual activity. At the trial the state offered no expert evidence that the book was "utterly without socially redeeming value" nor any evidence of "national standards."

The appellate court concluded that evidence of a "national" standard of obscenity was not required and evidence that the book lacked "redeeming social value" need not be presented. Since the book appealed to the prurient interest in sex, the court concluded that the book was not protected by the First Amendment.

Justice Burger for the Court majority held that the absence of pictorial content does not entitle a book to First Amendment protection because expression is based on words alone. Even where the consequences of circulating obscene literature are based on unprovable assumptions, Burger supported State control over commerce in such literature and extended such control to include commerce involving consenting adults. The "contemporary community standards of the State of California" were declared a sufficient test for the obscenity and expert or other ancillary evidence of obscenity was not constitutionally required of the prosecution.

In this case, as in the other four which treated obscenity charges, Burger joined with White, Blackmun, Powell, and Rehnquist to vacate the lower court decision and remand for further proceedings in accordance with the newly enunciated standards.

U.S. v. 12 200-ft. Reels of Super 8 mm Film, U.S. (1973).

Movie films, color slides, photographs, and other printed and graphic material was seized from the importer as being obscene. The importer relied on the First Amendment and Stanley v. Georgia, 394 U.S. 557 (1969) contending that "the right to possess obscene material in the privacy of the home creates a right to acquire it or import it from another country."

The issue in this case was whether the United States may constitutionally prohibit importation of obscene material which alledgedly is for private, personal use and possession.

Justice Berger for the majority held that the emphasis in the Stanley case was on freedom of thought and mind in the privacy of the home and a port of entry is not a traveler's home. Had Stanley not been so limited, Stanley would not be law today according to Burger. The Chief Justice continued that "the Constitution does not compel, and Congress has not authorized an exception /importation/ for private use of obscene material."

Justice Douglas in his dissent found no constitutional way by which printed or visual matter can be made contraband by virtue of its contents. He claimed that the Federal Government lacked censorship powers over literature or artistic productions except as granted by patent and copyright laws. Although in Douglas' view most of the materials in issue were trash and without redeeming social value he nevertheless concluded that "what may be trash to me may be prized by others. Moreover, by what right under the Constitution do five of us have to impose our set of values on the literature of the day? There is danger in that course, the danger of bending the popular mind to new norms of conformity. There is, of course, also danger in tolerance, for tolerance often leads to robust or even ribold productions. Yet that is part of the risk of the First Amendment."

Radio and TV

Columbia Broadcasting System, Inc. v. Democratic National Committee, U.S. (1973).

The Democratic National Committee asked the Federal Communications Commission (FCC) to rule that the Communications Act or the First Amendment barred a general policy of refusing to sell time for the

presentation of views on public issues. The FCC held that the Fairness Doctrine did not preclude the refusal of paid editorial advertisements, but the appellate court reversed, holding that "a flat ban on paid public issue announcements is a violation of the First Amendment, at least when other sorts of paid announcements are accepted."

Justice Burger (Justices Brennan and Marshall dissented) wrote the majority opinion which held that neither the Communications Act nor the First Amendment requires the acceptance of paid editorial advertisements by broadcasters.

Burger cited consistent Congressional refusal to grant access to broadcast facilities for all who wish to present public issues and noted that FCC has ruled that should no one command the use of broadcast facilities. The fear is that those able to pay would monopolize the system, that the Fairness Doctrine would be undermined, and that the public accountability of broadcasters would be diluted.

The Court further considered whether the action of a broadcast licensee is governmental action as defined by the First Amendment and held that it was incompatible with journalistic independence to regard the conduct of the licensee as governmental action.

Thus the Court upheld an absolute ban on editorial advertising because the FCC's Fairness Doctrine was regarded sufficient to protect First Amendment rights of the public.

Justice Brennan with Marshall dissented in favor of the Court of Appeals ruling that the First Amendment was violated by this p rmissible ban on the "free trade in ideas." The dissent found the Fairness Doctrine inadequate protection since "non-broadcaster" speakers were not guaranteed access to the airwaves to present their own views on controversial issues. Justice Brennan concluded by citing the lower courts contention that "it may unsettle some of us to see an antiwar message or a political party message in "the accustomed place of a soap or beer commercial...we must not equate what is habitual with what is right--or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy."

Newspapers

Pittsburg Press v. Pittsburg Commission on Human Relations, U.S. (1973).

A Pittsburg ordinance was construed by lower courts to forbid newspapers to carry "help-wanted advertisements in sex-designated columns except where the employer or advertiser is free to make hiring or employment referral decisions on the basis of sex."

The Pittsburg Commission on Human Relations rejected the argument that the ordinance violated the First Amendment and ordered the Pittsburg Press "to cease and desist such violations and to utilize a classification system with no reference to sex."

The Pennsylvania Courts upheld the order of the Commission and the Supreme Court granted certiorari to determine if as the Press contended, the order violated the First Amendment by restricting editorial judgment by the Press.

Justice Powell delivered the opinion in which Brennan, White, Marshall, and Rehnquist joined to affirm the constitutionality of the ordinance and the findings of the lower courts. Burger, Douglas, Stewart and Blackmun filed dissenting opinions.

Justice Powell wrote for the majority that although freedom of speech and press are cherished liberties this priority is not violated here because forbidding newspapers to carry sex-designated advertising columns for non-exempt job opportunities does not violate a newspaper's First Amendment rights. The advertisements here were held to be "purely commercial advertising" which under Valentine v. Christensen, 316 U.S. 52 (1942), is unprotected by the First Amendment.

The Press argued that to uphold the Christensen distinction between commercial and other speech should not apply here but Powell held discrimination in employment to be illegal commercial activity and subject to being forbidden just as want-ads proposing the sale of narcotics or soliciting prostitutes.

Powell concluded by reaffirming the First Amendment protection afforded editorial judgment and the free expression of views but held the ordinance, "narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities," did not violate the protected rights of the Pittsburg Press.

Chief Justice Burger dissented by protesting "a disturbing enlargement" of the commercial speech doctrine which he believes to be a "serious" encroachment on freedom of the press. Burger contended that although States may restrict commercial advertising this power should not be interpreted to allow control over the layout and organizational decisions of newspapers. Burger rated advertising as a co-equal with news items and editorials when granting First Amendment protection.

Douglas, Stewart, and Blackmun filed dissenting opinions in which they essentially opposed an order of government which dictates to a publisher in advance how he must arrange the layout pages of his newspaper.

III. Cases Docketed

Disposed

Civil Rights

Ruling below: A city ordinance which prohibited more than fifty persons from assembling in a downtown park where destructive assemblages had occurred for two out of four previous large meetings was held not to be an abridgement of free assembly and speech.

Issue: Does the ordinance violate the First Amendment by declaring the entire assembly unlawful? (Certiorari denied. Blasecki v. City of Durham, 41 LW 3016).

Ruling below: The First Amendment right of association is not violated by a Maine statute which allows non-renewal of liquor licenses of fraternal organizations with racially discriminatory membership policies.

Issue: Does such a statute violate First Amendment rights of association? (Appeal dismissed. B.P.O.E. Lodge No. 2043 v. Ingraham, 41 LW 3436).

Motion Pictures

Ruling below: By county ordinance a drive-in motion picture theatre may be prohibited from showing a movie visible to any motor vehicle operator on any public street or highway.

Issue: Does this ordinance violate First and Fourteenth Amendment rights: (Appeal dismissed. Varity Theatres, Inc. v. Cleveland City, 41 LW 3492).

States

Ruling below: The refusal to mail under a franking privilege a New York State Assemblyman's letter to constituents was held to be a legislative matter not subject to judicial review.

Issue: Does such refusal constitute prior restraint on free speech and a denial of due process. (Certiorari denied. Gottlieb v. Duryea, 41 LW 3216).

Elections

Ruling below: An Indiana statute which conditioned certification of a political party on filing an affidavit "that it is not affiliated with and does not cooperate with or have any relations with any foreign government or any political party, organization, or group of individuals of any foreign government" was held vague and overbroad.

Issue: Is the statute unconstitutional? (Affirmed. Whitcomb v. Indiana Communist Party, 41 LW 3435).

War

Ruling below: First Amendment rights are not violated when federal regulations during national emergencies require a license to receive literature from designated foreign countries.

Issue: Are regulations unconstitutional which grant administrative power to issue or deny licenses to receive unsolicited publications and no standards exist to govern the licensing power? (Certiorari denied. Veterans and Reservists for Peace in Vietnam v. Regional Customs Commissioner, 41 LW 3128).

Contempt

Ruling below: A newspaper reporter was properly found guilty of refusing to reveal sources who furnished him with statements allegedly in violation of a court order prohibiting such statements.

Issue: Does the First Amendment protect against compulsory disclosure of sources of information when no compelling and overriding national interest can be shown? Is there prior restraint when a court order prohibits speech pending disposition of judicial proceedings? (Certiorari denied. Farr v. Los Angeles City Superior Court, 22 Cal. App. 3d 60).

Newspapers

Ruling below: The First Amendment did not protect a newspaper reporter who before a grand jury refused to identify a source who told the reporter she sold "grass."

Issue: Can a newsreporter be punished for non-disclosure of a source to a grand jury where evidence purportedly indicates that the grand jury investigation was an harrassment of an unfriendly press? (Certiorari denied. Lightman v. Maryland, 266 Md. 550).

Ruling below: When a newspaperman disclosed information concerning government corruption and identified the source he waived his privilege under state law and can be compelled to testify before a grand jury.

Issue: In order to preserve First Amendment rights must the prosecution show "compelling need, relevance, and materiality" in order to force a newsman's testimony before a grand jury? (Certiorari denied. Bridge v. New Jersey, 41 LW 3455).

Criminal Law and Procedure

Ruling below: The Federal Riot-Travel Act (18 U.S.C. secs. 2101-2102) does not unconstitutionally infringe rights of speech and travel.

Issue: Does the Federal Riot-Travel Act under which the "Chicago Seven" were convicted violate First Amendment rights? (Certiorari denied. Dellinger v. U.S., 41 LW 3381).

Ruling below: An ordinance which made unlawful "noisy, boisterous, rude, insulting or other disorderly manner, with the intent to abuse or annoy" was held not to violate the Constitution.

Issue: Was the ordinance sufficiently vage and lacking in proper guidelines for enforcement to make it unconstitutional? (Certiorari denied. Hoffman v. Cincinnati, 31 Ohio St. 2d 163).

Ruling below: A Chicago ordinance which declared as "disorderly conduct" failure to obey a dispersal order where three or more persons are committing acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance or alarm" was held not to be so vague and overbroad as to be unconstitutional. The circumstances at the Democratic National Convention were such that First Amendment rights had to yield to necessity for the city to maintain peace and order.

Issues: Does the Chicago ordinance as construed by the lower court violate First Amendment rights? Were the defendant's engaged in First Amendment activity and thus protected from arbitrary arrest? (Certiorari denied. Weis v. Chicago, 281 NE 2d 310).

Ruling below: A statute which made it a criminal offense "to make unreasonable noise" with "intent to cause public inconvenience, annoyance or alarm" applied to the defendant who shouted to a Soviet diplomat on a public street: "Read this, Russian" properly resulted in the defendant's conviction.

Issue: Were the statute and the subsequent conviction unconstitutional under First Amendment protections? (Appeal dismissed. Davis v. New York, 41 LW 3136).

Ruling below: A municipal ordinance which made it unlawful "to challenge to fight, assault, strike, verbally abuse or make derogatory remarks to a police officer in the performance of his duties" was not unconstitutionally vague or overbroad.

Issue: Is the ordinance unconstitutionally overbroad? (Certiorari denied. Walker v. City of St. Petersburg, 261 SO 2d 151).

Government Property

Ruling below: The First Amendment takes precedence over a federal statute (40 U.S.C., section 193 g) which limits parades and assembly on the U.S. capitol grounds.

Issue: Is the statute banning unauthorized activity on the U.S. capitol grounds violative of the First or Fifth Amendments? (Certiorari denied. Capitol Police Chief v. Jeannette Rankin Brigade, 41 LW 3122).

Government Personnel

Ruling below: The discharge of a non-civil service state employee for failure to support the political views of his immediate superior was held in violation of the First Amendment.

Issue: When discharge from employment appears motivated by the employee's political beliefs, should the employee be protected by the Civil Rights Act and the First Amendment? (Certiorari denied. State, County, and Municipal Employees v. Lewis, 41 LW 3421).

Military

Ruling below: When according to Army regulations a commanding officer restricted distribution of a newspaper prepared and published by enlisted men, the regulation restricting distribution on Army installations was held constitutional.

Issue: Does the regulation violate the First Amendment through prior restraint upon the dissemination of printed matter on military installations? (Certiorari denied. Noland v. Desobry, 41 LW 3117).

Education

Ruling below: A Maryland statute which made it unlawful to refuse to leave the buildings or grounds of public educational institutions after being requested to do so by an authorized person was held neither void for vagueness nor violative of rights to free speech and assembly.

Issue: Was the conviction unconstitutional because the activities were protected by the First Amendment? (Appeal dismissed. Kirstel v. Maryland, 284 A 2d 12).

Ruling below: First Amendment rights of teachers, parents, librarians, and school children were violated by a school board which banned from school libraries a book which was considered to have objectionable language and content.

Issue: Are First Amendment rights transgressed by orders to remove from a school library a serious book which contains four-letter words and describes sexual activities? (Certiorari denied. President's Council v. Community School Board No. 25, 457 F 2d 289).

Ruling below: The dismissal of a public school teacher solely for refusal to participate with others in pledging allegiance violates the teacher's First Amendment rights.

Issue: Are the teacher's rights to expression or belief infringed by a school board which requires, as a condition of employment, that the teacher participate in and lead students in a daily pledge of allegiance? (Certiorari denied. Central School District No. 1 v. Russo, 41 LW 3510).

Ruling below: A school principal was held to have legitimately exercised his authority to prevent disruption of the educational process when he suspended a student for wearing a Confederate flag emblem which had previously resulted in racial tensions.

Issue: Can a school official punish a high school student for the expressive activity of wearing a jacket sleeve patch which as an official school symbol had previously caused tension and disorder? (Certiorari denied. Melton v. Young, 465 F. 2d 1332).

Ruling below: The University of Missouri was held not to have violated the First Amendment rights of a graduate student who was expelled for on campus distribution of an official campus newspaper which contained material judged obscene by university administrators.

Issue: Are First Amendment rights violated by dismissal for distributing a licensed campus newspaper under a regulation prohibiting "indecent speech"? (Reversed and remanded. Papish v. University of Missouri Board of Curators, 464 F. 2d 136).

The Court took exception to the Appeals Court ruling that on a university campus freedom of expression is "subordinated to other interests such as, for example, the conventions of decency in the use and display of language and pictures." The Court cited the precedent of Healy v. James, 408 U.S. 169 (1972), in which they upheld the right of an educational institution to enforce reasonable rules governing student conduct but reaffirmed that "state colleges and universities are not enclaves immune from the sweep of the First Amendment." In this case the Court majority declined to find a dual standard in the academic community with respect to speech content and further found no justification for declaring that the University action was a nondiscriminatory application of reasonable rules of conduct.

Justices Burger, Blackmun, and Rehnquist dissented contending that such limitations on university control over its students do not protect values inherent in the First Amendment but detract from those values and foster taxpayer and legislator disenchantment with that which they are called on to support.

Ruling below: An eleventh grade teacher who wore a black arm band to class in protest against the Vietnam War was protected by the First Amendment from being discharged by the New York Board of Education.

Issue: Is there a constitutional right for a teacher to wear a black arm band to class in protest against war? (Ceriorari denied. Central District Board of Education v. Jones, 461 F. 2d 566).

Obscenity

In addition to the formal opinions handed down in this area numerous other questions were raised by cases which had their judgments vocated after being granted certiorari. These cases introduced the following questions:

Does the First Amendment bar conviction under a state statute for distribution of obscene matter through publication of an offer to supply sexual materials where there is alledgedly no violation of contemporary community standards or appeal to prurient interests?

Does the seizure of films under a warrant without an adversary hearing on the question of obscenity constitute unreasonable search and seizure and violate constitutionally protected free speech?

Is a county as distinct from state or nation a proper "community" to exclusively determine whether publications exceed contemporary "community" standards in expressing sexual matters?

Without notice to the theatre operator and without a prior adversary hearing to determine obscenity can, under a warrant, search and seizure of motion picture film be undertaken without violating the Constitution?

Can a book containing exclusively text and no pictures be obscene? Is a defendant accused of selling of obscene book entitled to the defense that the mere selling of a book is insufficient to prove knowledge of its contents?

Does a state obscenity statute which permits conviction without evidence describing the elements of obscenity violate the exercise of free speech?

Pending

Civil Rights

Ruling below: An FCC "notice" to broadcasters that to broadcast in the public interest requires broadcast management to judge music containing drug oriented lyrics and to assess the wisdom of playing such does not abridge the broadcaster's freedom of speech. This responsibility was described as merely a restatement of pre-existing duty.

Issue: Does Smith v. California, 361 U.S. 147 (1959), fail to apply to broadcast media so that unlike print media, broadcasters can lose their license if they fail to "evaluate" the lyrics of songs they play? (Yale Broadcasting Co. v. F.C.C., 42 LW 3015).

Criminal Law and Procedure

Ruling below: A New York flag desecration statute which provided punishment for placing any design upon the U.S. "flag, standard, color, shield, or ensign" was held unconstitutional for abridging symbolic speech protected by the First Amendment.

Issue: Is the First Amendment violated by a flag desecration statute? (Cahn v. Long Island Vietnam Moratorium Committee, 42 LW 3016).

Ruling below: A defendant who shouted "fuck you" at a police officer and within hearing of passersby was properly arrested under a statute penalizing public cursing which "under contemporary community standards" is "so grossly offensive to members of the public who actually overheard as to amount to a nuisance."

Issue: Does the statute and consequently the arrest violate First Amendment rights and is an arrest within the statute when there is uncertainty whether the remark was overheard by anyone other than the arresting officer. (Von Sleichter v. U.S., 41 LW 333).

Ruling below: A Virginia statute, upheld as a reasonable exercise of police power, enabled conviction of a newspaper editor who advertised out-of-state abortion services.

Issue: Does a state statute prohibiting persons "by publication, lecture, advertisement, or by the sale or circulation of any publication" from encouraging abortion violate the First Amendment due to vagueness and overbreadth? (Bigelow v. Virginia, 213 Va. 191).

Ruling below: A Massachusetts statute prohibiting all acts contemptuous of the U.S. Flag was held unconstitutional for infringing on symbolic expression which might suppress ideas more than would be necessary to keep the peace and fulfill legitimate state purposes.

Issue: Is a flag desecration statute unconstitutionally vague and overbroad by limiting symbolic expression in the manner of the Massachusetts law? (Smith v. Goguen, 42 LW 3018).

Labor

Ruling below: An employer and others were enjoined from mass arrest and harassment of persons involved in peaceful picketing and protest.

Issue: Does a Texas mass picketing statute violate free speech and assembly guaranteed by the First Amendment? (Farah Mfg. Co., Inc. v. Clothing Workers, 42 LW 3035).

Ruling below: An employer violated the Taft Act by questioning employees about their union activities, threatening then with reprisals, advising them about the negative consequences of unionization, and laying off some of their union activities.

Issue: Did the National Labor Relations Board violate the employer's right to freedom of speech by ruling that oral comments to employees constituted an unfair labor practice? (Wisconsin Bearing Co. v. NLRB, 42 LW 3037).

Government Personnel

Ruling below: Statutory authority which authorizes removal of a federal employee "for such cause as will promote the efficiency of the service" is unconstitutionally vage and contrary to the employee's First Amendment rights.

Issue: Is the statutory authority sufficiently specific under the First Amendment to put employees on notice that they may be discharged for making public statements which charge superiors and colleagues with improper execution of official duties? (Probable jurisdiction. Phillips v. Kennedy, 349 F. Supp 863).

Ruling below: The conviction for contempot of news reporters, who contrary to a constitutionally invalid court order published an account of court proceedings, was affirmed. The reporters claimed that compliance, pending appellate relief from the court order forbidding publication, would have precluded exercise of First Amendment rights.

Issue: Can a court order patently invalid as an infringement on free speech be violated so as to result in contempt proceedings against the violators? (Dickinson v. U.S., 42 LW 3042).

Obscenity

Although the Court was able to dispose of numerous obscenity cases by the five formal opinions handed down on June 21, 1973, (reviewed under "II. Opinions Handed Down") several obscenity cases remain on the 1973-74 Supreme Court docket. These cases present the following questions which the Court may or may not choose to take up:

Are magazines which depict nude men and women in explicit sexual activity obscene in a constitutional sense if there is no evidence of pandering, sale to minors, or intrusion upon the privacy of unwilling individuals? (Carlson v. Minnesota, 42 LW 3018).

Does a state obscenity statute violate the First Amendment and become inapplicable when the defendants identify the sexual orientation of material, protect against exposure to juveniles, and avoid imposing materials on unwilling individuals? (Trinkle v. Alabama, 42 LW 3022).

To satisfy constitutional standards is the defendent entitled to present evidence that alledgedly obscene films are not obscene or is the representation of overt sexual conduct in itself outside First Amendment protection? (West v. Texas, 489 SW 2d 597).

Is a showing of knowledge of obscenity necessary to support conviction for knowingly circulating and publishing obscene movie film? (Little Art Corp. v. Nebraska, 204 NW 2d 574).

IV. The 1973-74 Term in Projection

Although block voting by the Douglas-led justices (Douglas, Brennan, Marshall) as opposed to the Burger-led justices (Burger, Blackmun, Powell, Rhenquist) offers an apparently easy insight into

how Court decisions will be made and what the fate of the First Amendment will be, such will not always be the case. (See Pittsburgh Press v. Pittsburg Commission on Human Relations and Popish v. University of Missouri Board of Curators).

The Court although rather conservative has not been reactionary and likely will not become such. It has eased away from liberal positions by supporting law enforcement rather than the rights of the accused; but at the same time the Court has opposed de facto school segregation, denounced the death penalty, upheld abortion statutes, and extended the 14th Amendment to women. Certainly it is less activist and reform oriented than the Warren Court and will apparently leave more to state legislatures and local preferences.

While the Court will be somewhat unpredictable, certain alignments of the justices seem apparent. On individual-rights cases the Douglas three can depend on support from Justice Potter Stewart. When law enforcement is an issue, the Burger four can count on Justice Byron White for their necessary fifth vote. Therefore, in these areas the Douglas bloc cannot prevail without Burger's support and the Burger bloc need only attract one of the swing justices (Stewart or White). Occasionally the Burger bloc will lose Justice Powell but with both swing votes the Burger bloc will still be in the majority. When the Burger bloc takes a liberal stance, it will lose Justice Rhenquist but on these occasions he isn't needed anyway.

Justice Douglas, the oldest in service and most liberal, along with Justice Rehnquist, the youngest in service and most conservative, will continue to represent extremes on the Court.

No crusades have been mounted in behalf of expanding First Amendment guarantees. The use of the First Amendment to protect expression from the reach of government has not been granted primacy when the Court is confronted with troublesome choices. In short, 1973-74 looks like more of the same.

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